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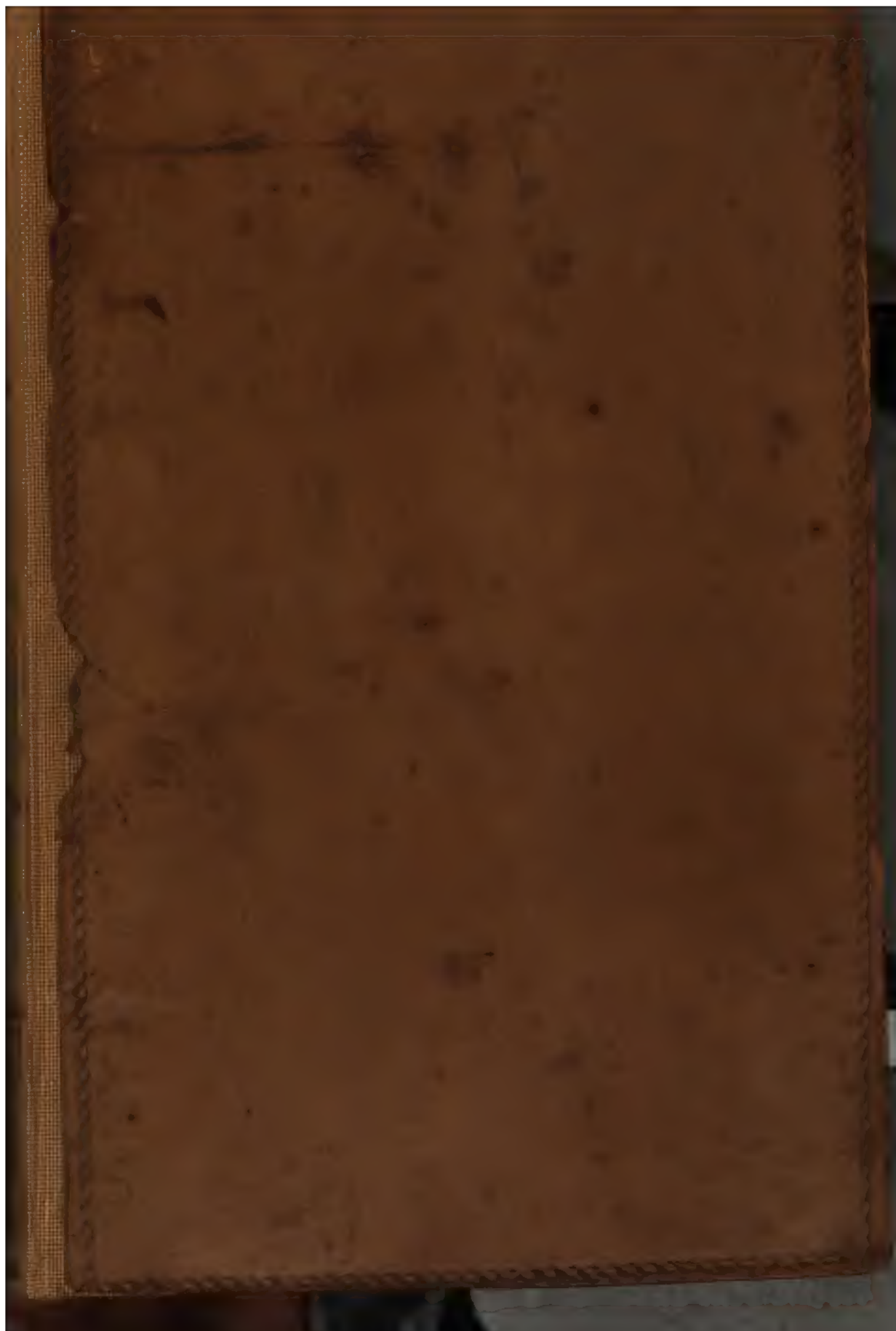
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;
COMMENCING WITH THE
J U D G M E N T S
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Easter Term 1808.

By THOMAS EDWARDS, L.L.D. ADVOCATE.

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1812.



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THE present Editor takes this opportunity of professing his design to continue the Admiralty Reports on the same Plan which was adopted by his Predecessor ; in succeeding to whose labours he has the Advantage of a model which it will be his ambition to follow as closely as may be accomplished by care and industry. Higher requisites than these are indeed necessary to the adequate performance of such an undertaking ; but it may at least be some satisfaction to the Public to know that he is in possession of all those means of correctness and fidelity which the liberal communications of his professional friends can supply.

Doctors Commons, 15th Feb. 1810.

**Judge of the High Court of Admiralty—The Right
Honourable Sir WILLIAM SCOTT.**

King's Advocate—Sir CHRISTOPHER ROBINSON.

**Advocate of the Admiralty—JAMES HENRY ARNOLD,
LL.D.**

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R E P O R T S

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,
&c. &c. &c.

MANILLA, BARRET.

April 1st,
1808.

THIS was a question arising on the construction of the fourth clause of the Order in Council of the 11th of *November* 1807, as applied to those parts of *St. Domingo*, which had been wrested from the enemy by the insurgent negroes; the relaxation of the general prohibition to trade with the enemy contained in that clause being limited to the direct voyage between the enemy's colony and the country to which the neutral vessel belongs, or some free port in His Majesty's Colonies.

Ports and places of *St. Domingo* not in possession of the *French*, excepted out of the general character of the island as an enemy's colony since the Orders in Council recognized them as open to *British* trade.

For the Captors the King's Advocate and Arnold contended.—That the question had already been disposed of by the decision of the Court of Appeals * in the cases of the *Dart* and *Happy Couple*, in which it was held that notwithstanding the unsettled state of *St. Domingo*, it was still in point of law under the dominion of *France*, and must be considered as an

* Lords, 17th
March 1808.

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enemy's colony. That this *American* ship was trading from *St. Domingo* to *Gottenburg*, and consequently under those decisions was engaged in a commerce prohibited by the Order in Council.

* See Appendix,
A. B. C.

For the Claimants Lawrence and Swabey.—The *Dart* and *Happy Couple* were captured early in the year 1805, and the Lords decided those cases with reference to the time of capture.—They could not take upon themselves to determine that any part of *St. Domingo* was to be considered at that period as not partaking of the general character of the colony as it had not been so declared by His Majesty's Government *. But there are Orders in Council which have issued subsequently to the capture of those vessels permitting *British* subjects to trade to those ports of *St. Domingo* which are not in the possession or under the dominion of the enemy, and if by these orders *British* subjects are permitted to frequent such parts of the colony, they ascribe a distinct character to the places so excepted, of which neutrals are entitled to avail themselves equally with the subjects of this country.

JUDGMENT.

Sir *William Scott*.—This was the case of a vessel sailing under *American* colours and captured *December* 11th, 1807, on a voyage from *Port au Prince* in the island *St. Domingo* to *Gottenburg*. It was directed to stand over until a question upon the national character of that colony should be determined in the superior Court; because, if *St. Domingo* is to be deemed hostile, all particular parts of the island as well as the whole generally, this ship with her cargo, would be
subject

subject to confiscation as trading to a port not of her own country from a colonial port of the enemy. The peculiar circumstances of the island, which are well known, gave rise to that question; several parts of it had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of *France* and its authority, and maintained within those parts at least, an independent government of their own. And although this new power had not been directly and formally recognized by any express treaty, the *British* Government had shewn a favourable disposition towards it on the ground of its common opposition to *France*, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended therefore, that *St. Domingo* could not be considered as a colony of the enemy. The Court of Appeal however decided, though after long deliberation and with much expressed reluctance, that nothing had been declared or done by the *British* Government that could authorize a *British* tribunal to consider this island generally, or parts of it, (notwithstanding a power hostile to *France* had established itself within it, to that degree of force and with that kind of allowance from some other states), as being other than still a colony or parts of a colony of the enemy. There can be no doubt that the strict legal principle of that decision was correct; and yet at the same time, if circumstances can be pointed out in this case for a favourable distinction, the Court would not be disinclined to adopt it, without meaning to recede from or to enervate that principle. It turns out that subsequent to the occurrence of those cases, though prior to their determination, certain orders and instruc-

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* See Appen-
dix D.

tions had been issued by His Majesty's Government which raise the question, whether some particular ports in *St. Domingo* are not taken out of the general character which by that determination was affixed to the colony, at least with respect to cases occurring subsequently *. In these Orders in Council I observe, that the description is negative: "*British* vessels are permitted to go to such parts and places in the island of *St. Domingo* as are not or shall not be under the dominion and in the actual possession of His Majesty's enemies." Here is no affirmative description, no powers in possession are specified; but if this negative description applies in fact to *Port au Prince*, the rule restricting the colonial trade will not affect the present question, for it extends and can extend in reason, only to places under the *dominion or in the actual possession* of the enemy. Now it is matter of notoriety that *Port au Prince* is not under the dominion of *France* or *Spain*, it is one of those places of which this new power has possessed itself; and that it is not a mere military possession is sufficiently shewn, by the clearances and other documents which are regularly made out in the name of *Christophe* the chief of this anomalous black government. The question then is, whether under these orders the present case is not excepted from the operation of the principle laid down by the Lords; for with no semblance of justice can you apply the rule of colonial exclusion to places which you have recognized by public and solemn declarations not to be either in the dominion or possession of the enemy. In construing public acts, every word must be taken as expressive, and the words "*dominion and actual possession*," must mean something more than the mere fact of possession. What is the

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the legal meaning of *dominion*? Its legal meaning implies rightful possession and authority : as applied to private property it signifies not merely possession but possession with rights of property, that of which the person is *dominus* ; as applied to public possession it is the right of legal authority. In His Majesty's instructions of the 11th Feb. 1807, the expression made use of is, " under controul," a word of less definite meaning, and which may have a more or less restricted signification, but when I find " dominion" used in two instances, I must take it rather as interpreting and enlarging the meaning of the word " controul," than as in any manner restricted by it. It has been asked if this is the true construction of the Orders in Council, why are licences required? There may be many reasons for that requisition : it may be for the purpose of pointing out the particular ports to and from which the vessels are going, with a view to prevent an improper use being made of the permission given by the Orders, or for other purposes which would not in any manner interfere with the construction which I am inclined to put upon them. If there are purposes and motives for these Orders which are inconsistent with this construction, they are purposes and motives which are not expressed; and courts of justice are not to attend to latent motives and purposes in order to controul clear and definite declarations. Here is a positive declaration of the State that parts of *St. Domingo* are neither in the possession nor in the dominion of *France*. The Court has to look no further than to see whether the port in question comes within that description ; if it does, the Court is bound to apply all the consequences which belong to such a description. It cannot assume to say,

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it shall be good for one purpose but not for another. It is not necessary that this should amount to a perpetual recognition of the independence of these places as in the case of a formal and permanent cession. It is sufficient that there is a rightful and acknowledged suspension of the authority of *France*; that will in itself exempt the parties from the penalties of trading from an enemy's colony, and I shall therefore restore the ship and cargo on payment of the captor's expences.

July 13th,
1808.

THE GUILLIAUME TELL, SANNIER,
Commander.

Co-operation in the blockade of *Malta*—claim of joint capture by ships stationed at different points in support of the blockade, established.

THE present question arose on a claim of joint capture interposed on behalf of His Majesty's ships, *Culloden* and *Northumberland*, on the ground of associated service for the purpose, among other objects, of effecting this capture.—The prize was a *French* ship of war, which with another had been for some time blockaded in the harbour of *La Valette* in the island of *Malta*, by a *British* squadron then under the orders of Sir *Thomas Trowbridge* commander of His Majesty's ship *Culloden*, acting in the absence of Lord *Nelson*. In the night of the 29th of *March* 1800, the *Guilliaume Tell* made an attempt to escape, but was pursued and taken by the *Foudroyant*, and some other ships belonging to the blockading squadron, while the remainder kept their stations off the port, except the *Culloden* and *Northumberland*, which were at anchor at the time in the *Marsa Sirocco* bay, a few miles distant from *La Valette*.

An

An objection was taken to the evidence of Lieutenant *Oliver* of the *Northumberland*, who was stationed at a signal post on the island, and threw up rockets when the *Guillaume Tell* was putting to sea, as it appeared that he belonged to one of the ships claiming to share, and had not released his interest. It was admitted, that although he was not on board at the commencement of the chase, he was on board during part of the time.

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The Court said, That the question was of some nicety, whether this officer would be entitled to share, supposing he was not on board, on account of the intelligence he was the means of conveying ; but that it should allow his evidence to be read, subject to all objections.

For the actual Captors, Lawrence and Swabey.—Two witnesses only have been examined upon the allegation given on the part of the *Culloden* and *Northumberland*: Lieutenant *Oliver* of the *Northumberland* and *M^cDonald* the master's mate of the *Culloden*. If Lieutenant *Oliver* is an incompetent witness, their case must depend entirely upon the evidence of *M^cDonald*, who is a releasing witness, and whose testimony therefore, taken alone, cannot support a claim of this nature. He states, “that about twelve o'clock on the night when the enemy put to sea, having gone up to the mast-head of the *Culloden* to look out, he saw the rockets and blue lights which Lieutenant *Oliver* threw up on observing the French ship *Le Guillaume Tell* haul out from the harbour. And in about ten minutes afterwards (it being very dark, the moon having gone down and the wind blowing strong out of the said harbour of *La Valette*) he heard guns firing from ships

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off the said harbour, and very soon after saw the flashes from the said ships' guns in three directions. That he continued to look out there (except at short intervals, when he went to communicate with the commanding officer) till about half past three o'clock in the morning, by which time the three engaging ships had got so far to the N. N. E. that he could no longer see the flashes from the guns ;" and he adds, " that when he came down upon the deck of the said ship to report to the commanding officer, the flashes from the guns of the said engaging ships were plainly seen from the poop." Now how does this accord with the evidence of Lieutenant *M'Kenzie* and the three other witnesses, examined on behalf of the actual captors ? They state, that at the time the first guns were discharged from any of the chasing ships they must have been twelve or fifteen miles from *Marfa Sirocco* bay, and as the prize and the chasing ships were *all that to windward*, and the wind blew strong, it is hardly possible for the report of the guns to have been heard and the flashes seen in the *Marfa Sirocco* bay. At the same time the mistake is easily explained, as there was during that night much thunder and lightening in the quarter where the enemy was pursued, which had the appearance of an engagement at a distance ; so much so, that the *Foudroyant* was for some time led out of the due course of pursuit by mistaking those appearances for an engagement between the more advanced chasing ships and the enemy. And the fact is, that the *Foudroyant* did not come up with the *Guillaume Tell* so as to bring her to action till six o'clock the next morning, at which time she was 11 or 12 leagues distant from the bay where the *Culloden* and *Northumberland* were at anchor. That the mere fact of association

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association or of sight, taken singly, is not sufficient, has been decided in the cases of the *Mars* and the *Trautmansdorf*. The case of the *Genereux*, which was decided by the Lords on an appeal from the Vice Admiralty Court at *Minorca*, is strictly in point; as it was a capture arising out of the same service. In that case Captain *Ball*, who acted as governor of the island, sent information to Lord *Keith* on the 15th Feb. 1800, that a *French* squadron, consisting of one ship of the line, and four smaller vessels, were expected for the relief of the *French* in the garrison of the port and city of *La Valette*. The *Foudroyant* and two other ships of the line were immediately ordered to look out for the enemy in the S. S. E., and the *Lion* was ordered to take a station off the passage between *Gozza* and *Malta*, while the commander in chief stationed the rest of the vessels in such a manner as to prevent the enemy from entering *La Valette*. On the morning of the 18th the *Foudroyant*, and the other vessels sent in chase, obtained sight of the enemy on that side of the island which is *opposite* to *La Valette*, and after a short engagement the *Genereux* surrendered. It was alledged, "that at the time of capture, the *Lion* was sufficiently near to hear the report of the guns fired during the engagement: that the *Lion*, as well as the other stationed ships, formed a part of the same squadron under the same commander, and that they took their respective stations in consequence of signals made by him, upon receiving intelligence of the approach of the enemy." Yet this allegation, strong as the facts were, was rejected. Now what is the association in the present case? The *Culloden* had sustained considerable damage, and the *Northumberland* had 130 of her crew sick on shore; they were stationed for the distinct

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distinct service of keeping the *Marfa Sirocco* bay in a state of security, and it was the only service of which they were capable. Before these ships can be considered as associated for the purpose of making this capture, some orders must be shewn to take them out of the particular service in which they were employed. Besides, the state of the wind was such at the time of capture, that these two ships could not have got out of the bay even if they had not been otherwise incapacitated.

The King's Advocate and Arnold in reply.—As to the disabled state of the *Culloden* and *Northumberland*, that is assumed from a description given three weeks before, and it was not then said that they were not in a condition to put to sea under any circumstances. They were at anchor in the *Marfa Sirocco* bay, respecting which Lord *Keith*, in his letter addressed to Lord *Nelson*, when he left the command to him, had said, “that it would be a prudential measure that a force should be stationed in the bay, with a view to secure a place for the disembarkation, if it should become necessary.” But that was not an order given to these particular ships, and therefore it cannot be said that a new order must be given before they could quit the station. As to the impossibility of their joining in the chase, arising from the state of the wind, that will not exclude them.—At *Aboukir* the *Culloden* was on shore during the whole of the action, but she was not, on that account, disqualified from sharing; the belief that she would get off was operating every moment as an encouragement to our own fleet, and as a source of apprehension to the enemy. It is said, that these ships were laid up in the *Marfa Sirocco* bay, which

which we deny, both in respect to the place itself, and the condition of the ships. Whether the witness, *M'Donald*, was deceived by the appearances of the storm, or whether he actually saw the flashes of the guns, during the chase, may be matter of dispute; but it is certain, that the escape of the enemy was known on board the *Culloden* and *Northumberland*, and it is equally certain, that these two ships were associated with the rest of the squadron, as well in the particular service by which the capture was effected, as in the general service of the blockade of the harbour.

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JUDGMENT.

Sir *William Scott*.—The present question arises upon a claim which has been interposed on the part of His Majesty's ships *Culloden* and *Northumberland*, to share in this prize as joint captors. It appears that the harbour of *La Vallette*, at *Malta*, from which this prize (an enemy's vessel of war) was attempting to make her escape, had been for some time blockaded by an *English* squadron, and that the whole of the island was in possession of the *English* and the inhabitants, except this port, which still continued in the hands of the *French*. The object of the blockade was, to reduce the port, and of course to obtain possession of the ships within it. Much evidence, which it is not necessary for me to enter into, has been adduced relative to the history of the blockade, to shew under whose direction it was instituted, and by whom it was carried on. It is an admitted fact, that Sir *Thomas Troubridge* had taken the command of the squadron during the absence of Lord *Nelson*, and that his attention had been particularly directed to the capture of
this

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this and another *French* ship, which were blocked up in this harbour. Whether he issued any particular orders respecting these ships has been a subject of controversy between the parties ; but it is of little importance, because, in succeeding to the command, he necessarily succeeded to all the orders given by his predecessor, and consequently will be entitled under them. These two *French* men of war were known to be in the harbour, and the obtaining possession of them must therefore be presumed to be in the intention of every ship upon that service ; for it is not to be lost sight of, that they were associated in one common enterprize of which the capture of these vessels formed no insignificant part. If this ship had been taken in the harbour of *La Vallette* upon its final reduction, as the other vessel was, no doubt could have arisen upon the subject ; but as the capture was made at a distance from the port, a question is started, whether it is to be considered as a capture by the whole fleet, or only by the individual ships by which she was pursued and taken. Now, it must have presented itself to the minds of all the naval officers employed upon that duty, that these ships would, if possible, attempt an escape, and there is abundant evidence to shew that every precaution was adopted to frustrate the attempt. Every necessary arrangement was made by Sir *Thomas Trowbridge* with the commanders of the different ships, in expectation of this probable event ; they were ordered to be on the look out, and the proper signals to be used in case the blockaded ships should attempt to escape were regularly communicated. It does not appear that any particular ships were assigned to proceed after them, and I think one may see a sufficient reason for that, because the

the time of the escape, the course they might adopt, and the state of the wind at the time when the escape was to be attempted, were all equally uncertain. In such a state of circumstances, no other order could be given than the general order, that in whichever quarter the attempt might be made, a sufficient number of the contiguous ships should pursue. There was a general communication to all the commanders, that they were to act as emerging circumstances might require; but it never could have been intended that every ship of the Squadron was to join in the pursuit, when it would have had the effect of opening the harbour for all other blockaded vessels, of which some in consequence of this total desertion of the blockade must have effected their escape. The *animus persequendi* is sufficiently shewn by the part which they took in the general plan of co-operation; they were all in readiness to act under the general order to pursue as occasion might require. It appears that they had information not only of the intention to escape, but also in a sort of general though uncertain way of the time and manner of it. It was known that on the first dark night the enemy were to push out some merchant ships as a decoy, and that then the *Guillaume Tell* was to follow. She was seen in a state of preparation, and was expected on this day to make the attempt the following night, so that Sir *Thomas Trowbridge*, and his ship the *Culloden* in particular, would be pretty much on the alert. It is proved, that he ordered a lieutenant and three men to be sent alternately from the *Culloden* and *Northumberland*, to a post on shore called the *Belvidere*, to give notice of the movements of the enemy, and that upon observing them under weigh, a preconcerted signal was to be made from that post, by which it was to be understood that

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that the *French* ships were in motion, and that every effort ought to be made to intercept them. The two ships setting up the present claim, the *Culloden* and *Northumberland*, were lying at anchor in the *Marsa Siracca Bay*, near *La Valetta*. The *Northumberland* had a number of her crew sick on shore at the time, but still she was not disabled by that deficiency of her crew, at least in the opinion of the Commander, as she was actually ordered to sea the next morning in pursuit of the *French* ship, though that order was countermanded upon its being understood that the *Fraser* and *Lion* were up with the enemy. It has also been objected, that the *Culloden* was not in a fit condition to put to sea, in consequence of an accident which she had met with on going into the bay; but it clearly appears that the damage had been repaired, and in proof of that there is the fact that she afterwards made the voyage from *Malta* to *England*, without receiving any further repairs whatever. At such a moment of expectation and anxiety, it cannot be supposed that Sir *Thomas Troubridge* put his own ship out of the course of co-operating and participating in whatever hazards or advantages might arise. It is proved that every evening men were sent from the *Culloden* and *Northumberland* to watch the movements of the enemy; that on the night of the pursuit the signal rockets and the flashes of the guns were seen from these two ships in the neighbouring bay, and that a seaman was dispatched from the signal station, to inform them that the *Guillaume Tell* was in motion; it cannot be denied therefore, that they knew perfectly well what was going forward, and that they were co-operating in the measures established generally for preventing the escape. But it has been objected, that they had not the physical means of pursuing, because the state of the

wind

wind was such, that they could not quit the bay. Whether they would have pursued, if it had been physically possible, it is not necessary to enquire: In the case of chasing by a fleet, the *animus persequendi* in all is sufficiently sustained by the act of those particular ships which do pursue. It is I think highly probable that even if the wind had been fair, the *Culloden* and *Northumberland* would have remained, as some of the other ships off *La Valette* did, in a state of inactivity, reasonably judging from the precautions taken, and from the flashes of the guns, that a sufficient force had already gone upon the service. Therefore, unless it can be maintained, which it certainly cannot, that the whole of a squadron must in all cases pursue, and that the other ships which remained inactive off *La Valette*, are not entitled to share, upon what principle are these two ships to be excluded? But it has been urged, that as the wind then was, ships of their burthen could not have cleared the shoals so as to get out; and it comes therefore to a question of law, whether such an intervention of physical impossibilities will exclude a ship forming part of a squadron associated for the express purpose of making the capture. There have been cases in which it has been determined that physical impossibilities of some permanence, and which could not be removed in time, would have such an effect as for instance, in the case of a ship lying in harbour totally unrigged, which has been held to be as much excluded as one totally unconscious of the transaction, because by no possibility could that ship be enabled to co-operate in time. But I take it that in no case the mere intervention of a circumstance so extremely local and transitory as the accidental state of the wind, has been made a ground of exclusion. The interests of joint captors would be placed on a very preca-

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* Lords, 7th
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† Lords, 1st
August 1795.

precarious and uncertain footing indeed, if a doctrine were to be admitted which referred them to the legal operation of a casualty so variable in itself, and so little capable of being accurately estimated. It being proved in this case, that the whole fleet were acting with one common consent, upon a preconcerted plan for the capture of this prize ; it was as much a chasing under orders from the officer in command, as if it had actually taken place in the open sea. It is a chasing by signal and in sight of these two ships, which even if they had not been incapacitated by the state of the wind, in all probability would not have thought it necessary or proper to join the pursuit. The cases which have been cited were very different from this; the * *Genereux* was captured upon the coast of *Sicily*, at the distance of 22 leagues from *Malta*, by a part of the squadron which were sent to look out for her, while the rest kept their station off *La Valette* ; there was no fight, and the utmost they could bring the case up to was, that a firing of guns was heard by one of the stationed ships. In the case of the *Mars* there was neither fight nor association, and in the † *Trautmansdorf* there was the same defect of a want of association. Now in this case there was not only an actual fight, not only a perfect connusance of what was going forward, but as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined ; I am therefore of opinion, that the *Culloden* and *Northumberland* are entitled to share, and that the same right will extend to the other ships which remained off *La Valette*, although they have not made themselves parties to this suit.

THOMYRIS, RUSSEL.

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THE question which arose in this case was respecting a quantity of barilla which had been brought to *Lisbon* in an *American Vessel* from *Alicant* in *Spain*, and was there put on board this Ship, for the purpose of being carried on to *Cherburgh*. It was contended on the part of the Captors that this was a mere transshipment of the barilla from one Vessel to another at an intermediate port, which under the authority of former decisions was not sufficient to break the continuity of the voyage.—That it must be considered as one entire voyage from *Cherburgh* to *Alicant*, and consequently that the barilla was subject to condemnation, under the Order in Council * prohibiting the trade from one enemy's port to another.

Spanish Barilla
going to *France*
—ostensible sale
and importation
in the port of
Lisbon, not held
to break the
continuity of the
voyage.

* Jan. 1807.
See Appendix.

On the part of the claimants, it was urged that there was not merely a transshipment but an actual sale of the barilla at *Lisbon*.—That it could not be contended that the exportation of goods from *Lisbon* to *Cherburgh* was illegal in itself, as it was part of the accustomed trade of the country, with which the Order in Council was not intended to interfere. That the claimants having become purchasers of the barilla at a public sale, they were at liberty to embark in the speculation of sending it to *France*. That it was a new speculation, originating with themselves, to which the seller was in no respect a party, and consequently that it was impossible to maintain that the present was a continuation of the former voyage.

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JUDGMENT.

Sir *William Scott*.—This was the case of an *American* vessel laden with a cargo of barilla and cotton, and captured on a voyage from *Lisbon* to *Cherburgh*. The ship has been restored, and the Court directed further proof to be made of the property of the Cargo, and also as to the importation of the barilla into *Portugal*. The witnesses examined in preparatory state, that it was brought on board in lighters from an *American* brig then at *Lisbon*; and the mate, who speaks with less reserve than the others, says that the brig was called the *Hannah*, and that he was informed by the crew with whom he was acquainted, that she came from *Alicant* in *Spain*. This is a material fact, and it is fully established by the proofs now brought in by the claimants. In the original papers there is nothing particularly pointing to the barilla, so as to furnish any explanation of its former history: there is only a certificate of the *Spanish* Consul at *Lisbon*, describing generally the whole of the cargo as the produce of the *Portuguese* colonies. It is quite unnecessary for me to say, that the Court can pay no attention to a document like this, which carries upon the face of it the condemnation of its own credit, and it is not much assisted by the kind of apology which has been suggested, that it must have been a mere involuntary mistake of the writer, and not intended to apply to the barilla, because it would be absurd to describe that as coming from places, which it is notorious do not produce it. That is an excuse which cannot be admitted; it is the duty of every person who grants a certificate to know precisely what it is that he does certify and to what extent, otherwise all faith in public instruments must be at an end. And when it is said that at any rate this

certi

certificate could deceive no one, as it is notorious that barilla is not the production of the *Portuguese* colonies, I am by no means certain that the fact is of such universal notoriety; it is I think extremely possible that it might be unknown to many of the commanders of His Majesty's cruizers, some of whom might have been deceived by such a misrepresentation.

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In all cases of this description, it is a clear and settled principle that the mere transshipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country where the transshipment takes place. It therefore became absolutely necessary that the Court should require further evidence upon the subject, because if there was nothing more than a transshipment of the cargo from one vessel to another, that will not alter the transaction in any respect, and it must still be considered as the same continuous voyage to the port where the cargo was ultimately to be delivered. It is however contended that there was not simply a transshipment of this cargo, but likewise an actual sale of it upon its arrival in the *Tagus*; and therefore that the question arises whether the additional fact of a sale being made of the cargo at the port of transshipment, will, under all the circumstances attending such sale, give it the character of a new voyage, or whether the two parts are so linked together, that it must still be considered as one entire voyage from *Alicant* to *Cherburgh*. The fact that the goods after their arrival in the *Tagus* were converted by sale has been much relied on, as satisfactory evidence of an actual and *bond fide* importation into the country; and generally speaking it is so, because it is to be understood in most cases that goods are actually imported

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before they can be sold ; but it has never been decided that where goods are brought to an intermediate port, not *animo importandi*, but sold whilst water borne, and then transhipped, such sale with transshipment makes a new exportation from the port in which it is transacted. In order to constitute an exportation, there must have been a previous importation, in the case of commodities not native ; where a cargo is sold to be immediately transhipped and exported, that can never be considered as any importation at all ; it is all one act, of which the sale and the transshipment are only stages ; they lengthen the chain, but do not alter its direction. Now in this case, the evidence of importation (and indeed that of sale) is very imperfectly sustained, there is no *clearance*, no Custom House certificate to shew that the duties have been paid, the whole is made to rest on the affidavits of the three persons immediately interested in the transaction, the buyer, the seller, and the broker ; and how does the case stand upon their own representation of it ? I shall first consider the affidavit of the seller, the person who is pretended to have imported the goods, if there really was any importation. He says, “ that he caused to be sold at public auction to *Basto* and Co. through the intervention of a public broker, 460 bales of barilla, which were imported by him from *Alicant* for his own sole account, risk, and benefit, in the *American* ship *Hannah* ; that the said barilla was unladen at *Lisbon*, and weighed and paid the duties at the Custom House, and was afterwards shipped on board the *Thomyris*.” Mr. *Basto* the purchaser swears, “ that it was put on board the *Thomyris* after it had been put on shore and paid the duties at the Custom House at *Lisbon* ;” and the affidavit of the broker is to the same effect. I find difficulty in reconciling this representation of the matter with the account given in the examinations in preparatory, where it is said that

that the barilla was brought in lighters from on board an *American* vessel. Am I to suppose that the barilla was first landed, and then put on board the *Hannah* again for the purpose of being transhipped in lighters to the *Thomyris*? Such a circuitous mode of transacting business is not very intelligible; but taking the fact to be in some way or other as they have represented it, will such a sale as this of goods not imported and transferred before any thing that can be deemed an importation, for the avowed purpose of being immediately sent off, break the continuity of the voyage? It is clear from the broker's account contained in his certificate that it was perfectly disclosed to the seller or his agent that these goods, which at the time of this sale had never been imported, were to go immediately to *Cberburgh*. He therefore brings the goods from the enemy's country, without any intention of importation on his part, and instantly transfers them for the known purpose of conveying them to another port of the enemy. The buyer purchases them yet unimported from the enemy's country, and sends them forward on his own account to a port of the enemy. How far in substance does this differ from a sale on the high seas where no Custom House forms whatever would have been interposed? Here is a Custom House form interposed, provided faith is given to this imperfect proof of it, amounting to this, that the *Seller* shall after the sale pay the duty for the re-exportation. So that either the duty of importation has not been paid at all, or the same person who pays it, pays likewise the duty of the re-exportation, and so combines in himself the characters of importer and exporter. The goods are not delivered and do not become the actual property of the purchaser, till after the charges of exportation are satisfied

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by the seller, who thus constitutes himself the legal exporter. A certificate is exhibited by which some merchants at *Lisbon* attest "that to any ship coming from foreign parts shelter of the cargo is allowed, and that under such shelter goods are sold for re-exportation." Goods then are sold for this purpose of being carried away *not under importation* but *under shelter*. There is in fact neither import nor export, but the State raises upon the commodity a transit duty without either the one or the other. This is no breach of the continuity of the voyage; if permitted, it is clear that there would be no means of preventing an universal evasion of that Order which prohibits the trade between the ports of the enemy. The produce of the North might be conveyed to the South, and *vice versa* by the intervention of merchants stationed at *Lisbon*, at the mere inconvenience of touching at the *Tagus* and paying a slight duty of transit. It has been said, and justly said, that it was not the intention of His Majesty's Government to break in upon the accustomed trade of Neutrals. I am of opinion that this is not so to be considered, even on the supposition that the fact was correctly described on the very defective proof of it that has been exhibited. In what sense is it a trade of *Portugal*? Here is neither import nor export; here is nothing but the transit of foreign goods subjected to an operation of finance on the part of the State. How long such a practice has obtained is not shewn; so long as it does not interfere with the rights of third parties, it is no subject of the observation of others. But if an occasion arises on which another State acquires and exercises a right of prohibiting the passage of goods from one enemy's port to another, it appears to fall directly under that description, and is not privileged to elude that right by the plea of being an accustomed trade of the country.—Barilla condemned.

HIGH COURT OF ADMIRALTY.

PRIMA VERA, VODONICK *.

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IN this case certain proceeds, which had been paid into the Registry of the Vice Admiralty Court at *Martinique*, were remitted to the house of *Turnbull, Forbes, and Co.* by the Deputy Registrar, to be deposited in the Bank of *England*. Owing to some neglect that was not done, and the money was lost in consequence of the failure of that house while it remained in their hands; the question, therefore, was, whether either the Registrar or his Deputy should be held responsible for the loss.

Registrar of Vice Admiralty Court not responsible for money transmitted under proper precautions and in the usual course of business, for the purpose of being invested in the funds, and afterwards lost by the failure of the assignee.

JUDGMENT.

Sir William Scott.—This is a question upon which I have deliberated with a considerable degree of anxiety, not on account of any difficulty that appeared to attend the case itself, but from a conviction extremely painful, that in whatever way it might be decided a considerable hardship must fall upon persons in no other manner implicated in the loss of this property than as they are the victims of the imprudence or the misfortunes of others. A part of the cargo of this ship had been condemned as prize by the Judge of the Vice Admiralty Court at *Martinique*, the claimant appealed from that decision, and the goods were in consequence sold, and the proceeds paid into the Registry of that Court to abide the event of the appeal. The appeal was afterwards pronounced to be deserted, and a monition was prayed on behalf of the

* See Adm. Rep. vol. 5. p. 151.

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captor against Mr. *Martindale*, the Deputy Registrar of the Vice Admiralty Court, which had ceased to exist, to bring in the proceeds into the Registry of this Court. Mr. *Martindale*, who was in *England* at the time, appeared to the monition, and stated that he had remitted the proceeds to the house of *Turnbull, Forbes, and Co.* of *London*, conformably to the directions he had received from Mr. *Bentinck* his principal, and prayed to be dismissed. Upon this statement the Court declined granting an attachment against him, but refused his prayer to be dismissed, being of opinion that there might still be sufficient reason for holding him before the Court, till it had determined upon the question of loss which has been sustained in consequence of the failure of this house of *Turnbull and Co.* in *London*. A monition was then applied for by the captor against Mr. *Bentinck* the principal Registrar, and an act has been entered into by all the parties, which states the facts of the case, and the grounds upon which they respectively consider themselves entitled to be exonerated. — Mr. *Bentinck* has appeared under protest, probably because the transaction took place in another Court; but where a Vice Admiralty Court has been abolished, this Court, in a variety of instances, has felt itself authorized upon its general jurisdiction, which extends universally over the king's dominions, to interfere, and to supply the remedy in order to prevent a failure of justice. Mr. *Bentinck* states that he was the principal Registrar, and that it was a rule of the Court, founded upon an order of the Governor, that all proceeds of prize property under litigation should be remitted to this country to be lodged in the public funds, or Bank of *England*, in the names of the Registrar or his Deputy, and trustees nominated by the parties;

parties ; and in this he is confirmed by the Judge of the Court himself, who states in an affidavit which has been brought in, that it was a matter of universal notoriety that suitors or their agents had not only a right, but were expected by the Court to name trustees. This rule, which appears to have become the general practice of the Court, is certainly very fit to be upheld upon every consideration of public convenience and private security ; and it has been made the basis of a general regulation nearly similar, which has since been incorporated into an act of parliament. Mr. *Bentinck* adds, that he strictly complied with this order, and upon his quitting the island to discharge the duties of another appointment elsewhere, he directed his deputy, Mr. *Martindale*, to conform to it. It is proved by the evidence of one of the partners, that in pursuance of these directions, *Martindale* did remit the money in bills to *Turnbull* and Co. and he accompanied the remittance with a letter, in which he says, " you will receive enclosed two bills, which together make the total of 4,376l. 16s. 10d. to be placed in the Bank of *England*, as nett proceeds of the cargoes of the brig *Rose* and ship *La Prima Vera*, condemned in our Court, and ordered to be lodged in the Bank to wait the event of an appeal. Enclosed you will find my account current with both vessels, and find the sum of 3,167l. 10s. 6d. to be lodged as proceeds of the brig *Rose*, and 1,209l. 6s. 4d. to be lodged as proceeds of the ship *La Prima Vera*. No trustees have been appointed for *La Prima Vera* ; but for the *Rose*, Mr. *James Sykes* of *Arundel-street, London*, was appointed on behalf of the captors." It appears then by this letter that no trustee was named by the parties, and it is equally clear that the money was remitted to

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to *England* by Mr. *Martindale*, in pursuance of the directions of his principal, and upon these two facts he rests his defence. Mr. *Bentinck* alledges that the Deputy Registrar had done all that it was in his power to do for the security and investment of the money, by remitting it to a house of undoubted credit at the time, with express directions to invest the same in the Bank of *England*: that it was wholly owing to the neglect of the captors or their agents that no trustees were appointed, and that due diligence was not used by them in enquiring whether the money was invested, and in taking care that it should be invested. It is not suggested that either the Principal or Deputy Registrar made any interest of the money whilst it remained in the hands of *Turnbull* and Co. or derived any advantage from it. But it is urged on the part of the captor, that Mr. *Bentinck*, as the Registrar, is responsible for all monies paid into Court, for which responsibility he is entitled to an allowance of five per cent. and that in the present instance the Registrar or his Deputy were bound either to remit the money to the Registrar of the Lords of Appeal, or to cause the same to be deposited in the Bank of *England*. It is also stated that frequent applications were made to Mr. *Martindale*, for information as to the manner in which the proceeds had been disposed of, and that it was refused; but this is expressly denied on the other side, and it seems unlikely, as the Registrar does not appear to have derived any benefit from the use of the money, and therefore had no interest in withholding it; besides, if he had withheld it, the Court upon application would have enforced the communication. In answer to the charge of neglect on the part of the captors in not appointing a trustee, they alledge that their agent

agent wrote to his proctor at *Martinique*, requesting him to move the Court to direct that this money should be lodged in the Bank of *England* in the names of trustees, and desiring him to nominate Mr. *Henry Desborough of London* for the captors. These are the general facts of the case, and the question is on whom the loss occasioned by this unforeseen calamity is to fall. For the captors it has been contended, that both the Registrar and his Deputy are answerable for all monies paid into Court. I admit it to be true generally, that they are answerable for money which they receive, though it may be difficult, in particular cases, to say in what proportion. If the money is lost through the misconduct or negligence of the Deputy, he is, I think, sufficiently known to the suitors and to the Court to be held personally, and directly responsible. How far the Principal is bound to supply the deficiency of his Deputy, if that should happen, I am not now called upon, by the necessities of the present case, to determine; but I am inclined to think that he is bound to supply the deficiency, and that he cannot discharge himself of the responsibility of the office, by devolving the duty upon another. For the office may be liable for some casualties, and generally when such casualty occurs, the parties I apprehend will be answerable to the same extent that they derive the profit where it arises from a proportion of the fees. Where the Deputy is paid by a fixed salary, and the loss arises from no misconduct in him, I am not prepared to say that he would be liable, and certainly I cannot go the length of holding that for all casualties, and under all possible circumstances, either the Registrar or his Deputy must be accountable. The Registrar is an officer of the Court, he is the receiver of the Court, and if he acts with

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with due diligence in the discharge of the duty which is imposed upon him ; if he does that which is unavoidable and necessary to be done in the payment or remittance of money, the suitors cannot come upon him. There are one or two cases of high authority which establish this doctrine. In the case of *Knight versus Lord Plymouth*, 3 *Atkins* 480, “ a person had
“ been appointed receiver under an order of the Court;
“ he did not think it safe to remit the money to *London*,
“ and therefore paid it to *Winsmore*, a considerable
“ tradesman of *Worcester*, and took bills of exchange
“ from him drawn on persons in *London*. *Winsmore*
“ soon after became a bankrupt, and there was an ap-
“ plication to the Court against the receiver to make
“ good the loss. It was referred to a Master to enquire
“ into the fact, who found that it was done for greater
“ safety ; and the Court said it would be very hard to
“ oblige the *receiver* to make good a loss which was not
“ owing to any default of his; that as the sum was large,
“ it was a necessary precaution to remit by bills rather
“ than in specie, and at the time the money was paid to
“ *Winsmore*, he had no reason to doubt its being lodged
“ in safe hands, and therefore indemnified the receiver
“ in the act he had done.” There is also a case in *Am-
bler’s Reports*, p. 218, “ *ex parte Belchier* in the matter
“ of *Parsons* a bankrupt, where an assignee employed a
“ broker to sell goods by auction; the money was paid
“ to the broker, and after remaining in his hands a few
“ days he died insolvent ; and the commissioners were
“ of opinion the assignee ought to bear the loss. Lord
“ *Hardwicke*, Chancellor, after argument at bar, said, if
“ the assignee is chargeable in this case, no man in his
“ senses would act as assignee under commissions of
“ bankrupt. This Court has laid down a rule with re-
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“gard to the transactions of assignees, and more so of
“trustees, so as not to strike a terror into mankind act-
“ing for the benefit of others, and not for their own.
“Courts of law and equity too, are more strict as to
“administrators and executors; but where trustees act
“by other hands, either from necessity or conformity
“to the common usage of mankind, they are not an-
“swerable for losses. If a trustee appoints rents to be
“paid to a banker at that time in credit, and the banker
“afterwards breaks, the trustee is not answerable.” His
Lordship then cited the former case, and decided that
the assignee ought not to be charged with the value
of the goods. Upon these authorities it is only neces-
sary for me to enquire whether the Registrar under a
sufficient necessity, and in the usual course of business,
remitted these bills to a house of unsuspected respon-
sibility at the time; if so, he will be exonerated. There
was a general order of the Court respecting all pro-
ceeds of prize property under litigation, and it is
shewn that the Deputy Registrar complied with the
order, and remitted the money in bills, which was the
only way in which it could be done. He could not
remit in specie, and it is not to be expected that
whenever money is to be remitted from a Vice Admi-
rality Court abroad, the Registrar should come over
to make the payment himself. In this respect he is in a
very different situation from the Registrars of this Court,
who having immediate access to the Bank, have no occa-
sion to employ an intermediate hand. It is admitted that
at the time *Turnbull* and Co. were perfectly solvent,
and I see nothing in the conduct of the Deputy Regi-
strar that can attach blame to him from the mere cir-
cumstance of his having remitted the proceeds through
their

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their hands. The principal Registrar stands aloof from the whole transaction, and can only be charged upon the general responsibility of the office. This brings us to another part of the enquiry, whether there have been lapses either in the Deputy Registrar or the Captors, in allowing the bills to remain in the hands of *Turnbull and Co.* It does not appear exactly when they became due, but it has been admitted in the argument to have been before the bankruptcy. Now I think it is fully proved that the captor was under an obligation to nominate a trustee. Was that done? all that is shewn is, that Mr. *Desborough* and *Martinique* directed his proctor to nominate his relation Mr. *Desborough* of *London* as captors' trustee in all cases; but it does not appear that this was acted upon by this proctor, or that any motion was made in the Court upon the subject. It seems to have rested entirely between the captors' agent and his proctor. Did the captors' agent make any enquiries after the money? he says, he did, but that the Deputy Registrar hung back. Why did he not apply to the Court? Mr. *Desborough* certainly had it in his power any hour of the day, when the Court was sitting, to obtain the information which he alleges was withheld: he says moreover, that he was satisfied with the responsibility of the Registrar, if so, the Registrar should have been distinctly told that the parties were satisfied with his personal responsibility, and how does this accord with the direction which Mr. *Desborough* states himself to have given to his proctor to nominate a trustee? I cannot but think that there was an inactivity on the part of the captors, or of the persons employed by them by which this loss has been occasioned: they never asked how the property was invested, their only en-

quiry was, whether it had been remitted? It is perfectly clear that in remitting the property to this country in the manner he did, the Deputy Registrar conformed to the order of the Court, and therefore there was no misconduct on his part that can fix him with any personal responsibility. At the same time I must observe that he would have done well, not by officiously going out of the limits of his duty, but by that sort of activity of accommodation which is of great use and value in conducting the public business of the world, if he had jogged the memory of the captors by reminding them that they had omitted to nominate a trustee. But the question is not how far he might have acted in a more praise-worthy manner, in not confining his information so exactly to the enquiries, but whether there has been that neglect on his part which will affect him with official negligence? Perhaps he had a right to suppose, if he thought at all upon the subject, that the captors meant to nominate a trustee till he was given to understand the contrary. He appears, throughout the whole of this transaction, to have acted in the usual course, and in strict conformity with his duty; and if there has been any neglect, I am of opinion that it is to be attributed rather to the agent of the captor than to him. Under these considerations, therefore, I shall exonerate both the Registrar and his Deputy from any responsibility on account of this unfortunate loss.

THE
PRIMA VERA.

Aug. 12th,
1808.

COMET, Mix.

Oct. 25th,
1808.

JUDGMENT.

Breach of the
Order in Council
of the 11th Nov.
1807.—*Ameri-*
can vessel in bal-
last from New
York to Nantes,
to bring away
goods said to
have been pur-
chased before
the order issued.
—Excuse not
admitted.

SIR William Scott.—This is a proceeding against an *American vessel* which was captured on a voyage from *New York to Nantes*; there was no cargo on board, as the ship had sailed in ballast, for the purpose, as it is said, of bringing away *French* produce, which had become the property of merchants in *America*, prior to the date of the order restricting the trade with the enemy's ports. Under that Order in Council the port of *Nantes*, when this vessel sailed, was subject to a rigorous blockade, and it has not been contended generally that a ship can enter a blockaded port even in ballast; that is a point upon which this Court has already decided; if wrongly, the decision must be corrected elsewhere. The rule of blockade has, it is true, been so far relaxed, as to permit an egress to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress there is not the same reason for indulgence, there can be no surprize upon the parties, and therefore nothing short of a physical necessity has been admitted as an adequate excuse for making the attempt of entry. Generally where a neutral ship is proceeding to a blockaded port, it must be supposed that she is going there for the purposes of trade. If she goes in ballast, it cannot be with the intention of being laid up for an indefinite time in a foreign port until the blockade is raised. It is a presumption which this Court, acting on reasonable principles, is bound to entertain and apply that she has no

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other errand there than to keep alive that commercial intercourse with the interdicted port which it is the object of the blockade to prevent. In some cases no doubt the rules of blockade are attended with considerable inconvenience to neutrals in abridging their trade, and it is always much to be lamented when they do; but they are inconveniences which arise necessarily out of a state of war, and what neutrals must submit to, looking as well to the rights of belligerents as to the interests which they themselves derive from their neutrality, and which furnish no small compensation. To say that this property was actually locked up by the blockade, and that there was no other mode of extricating it, is going farther than is exactly true: many channels of communication are still open, as these states are at peace with each other; the property might have been sold for its full value, and the money remitted, for it is not to be asserted that at the time this capture took place there was no practicable mode of remittance between *France* and *America*. It is stated, I observe, "that the property in question consists chiefly of brandy, and other proceeds of *American* goods sent in before the restriction was imposed," and there is a bond, dated 9th *June*, 1808, which was found on board, reciting a permission from the President of the United States for this vessel to proceed in ballast to *Nantes* for the purpose of bringing home brandy and other articles the property of the claimant; on condition that she is not to import any other merchandize under a penalty of 40,000 dollars. The words are "that she shall not, during the voyage, either directly or indirectly, be engaged in any traffic, freighting, or other employment, and that no goods, wares, or merchandizes shall be im-
ported

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ported in such vessel, other than the property for which such vessel has obtained such permission, or the proceeds of property shipped *bonâ fide* by a citizen of the United States, prior to the 22d day of Dec. last." There is nothing in this recital that points to the time at which these return goods were purchased and became the property of the exporter. It is not required that they should have become so before the commencement of the blockade. All that is required is that they shall be the proceeds (whenever acquired) of goods shipped before such a time; and it would sufficiently answer that description if they were purchased the week or the day before the permission was obtained. The permission from the President of the United States, can only have been intended to exempt this *American* vessel from the penalties attaching to the violation of their own embargo, for it cannot be supposed that the Government of a neutral state would assume to itself the power of relaxing a blockade. That right rests in the belligerent alone, and meaning to express myself with all the reverence which is due to the governments of neutral nations, I must observe that it is not to be expected that the belligerent country should trust the preservation of its rights to the vigilance of others. The relaxation must be the act of the belligerent upon a representation made on the part of the neutral state, or under a compact between the two governments, where it has been found to press with undue severity on the commerce of the neutral state. The permission which appears to have been given by a former captor to this vessel to proceed on her voyage under an ignorance of the law, can make no difference. Where there has been misinformation as to the fact, it may have a different effect,

effect, but the neutral is bound to know the law, and cannot alledge that he has been ill-instructed in that by a belligerent cruizer. If the cruizer had told the parties they might go on whilst they were connusant of the fact of the blockade, such misinformation upon a point of law would not protect the ship. It does not much extenuate the misconduct of this vessel, that she had passengers of a military description on board, though, perhaps, not in such numbers as to produce a condemnation.—Ship condemned.

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COMET.

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1808.

LEANDER, MURRAY, formerly LEWIS.

Nov. 4th,
1808.

(Instance Court.)

THIS was a suit for wages, instituted on behalf of *James Minus*, who was shipped at *New York* in *January* 1806, by *Lewis* the former master, as a seaman on board this vessel at 26 dollars per month, of which he received a month's pay in advance.—

The ship was one of those employed in the expedition against *Spanish America*, under General *Miranda*, and upon her arrival at *Jacmel*, in the island of *St. Domingo*, which was within a month from the time of the shipment of *Minus*, several of the crew were permitted to volunteer their services in the military department of the expedition, and *Minus* then entered as an artillery man. It was agreed between the master and those of the crew who volunteered, that from that period they were to cease to be considered as seamen, and were to receive a quarter

Question as to
wages earned
on an unauthorized
expedition.

quainted with all the circumstances of the antecedent history of the vessel ; but in making purchases of this description, it is scarcely possible for them to inform themselves of all the transactions, regular or irregular, in which she may have been engaged. And I should therefore be extremely unwilling, without further consideration and examination of the subject, to lay down universally that it is a principle which this Court is bound to act upon under all circumstances with respect to ships purchased of foreigners by *British* subjects, or by foreigners of *British* subjects. The allegation now offered states many circumstances which are dissembled in the summary petition ; it appears that no less than 180 men were engaged on board the vessel, and that the agreement was for a voyage from *New York* to *St. Domingo* and back again to *America*, whether to *North* or *South America* is not stated. Now this is a fact that favours very little of a commercial voyage ; they could not have been engaged for the mere purposes of navigation, as it is shewn that 15 men were amply sufficient for purposes of that species, and from this circumstance, as well as from general notoriety in the port from which the ship sailed, it was easy to surmise that the object of the voyage was not commercial. The fact is, that on coming in sight of *St. Domingo*, the true nature of the voyage was explained to all persons on board ; they were told that the ship was destined to form a part of General *Miranda's* expedition against *South America*, and that all those who chose to enlist would be entitled to prize money, and to an allotment of lands. This proposal was accepted by the claimant, who entered into a new agreement to serve as a soldier in the expedition ; so that here is an end of the former contract, if that was a contract purely maritime. I do not think it

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material to enquire whether he was to serve as a foldier or a failor, because the expedition itself appears to a Court of Justice merely as an unauthorized, and consequently an illegal adventure, not sanctioned by the government of any country, and such as will not support a demand for wages earned in the progress of it. What private connivance or encouragement might have been given by any particular state (as has been suggested in argument) does not appear; no public commission or formal authorization of any kind is pretended, and without something of that sort alledged or shewn, it is the mere unlicensed enterprize of an individual. To what country the *claimant* belongs is not stated. As a *British* subject he could not regularly embark in such an undertaking under this military commander without the authority of his government; and if he is an *American*, his own government had prohibited such an engagement by public proclamation. If he is a subject of some other country, the general objection holds that the expedition itself was the unauthorized act of a private person, out of which no legal claims can arise. For that part of the voyage which was legal, it is admitted that the wages had been paid in advance, and I am clear therefore that if this allegation is proved, it is of a nature to bar the claim which is set up, especially against the present holders of the vessel, who come in as innocent successors to the former owners, and knowing nothing of her antecedent history.
—Allegation admitted.

BABILLION.

Nov. 4th,
1808.

A Question arose in this case whether head money was due for men escaping on shore where the enemy's ship of war had been run a-ground and destroyed. The Court enquired whether the men were on board at the commencement of the attack, and being satisfied as to that fact, pronounced head money to be due.

EXCHANGE, LEDET.

Dec. 6th,
1808.

THIS was an *American* vessel with sugars from *Guadaloupe* bound ostensibly to *London* but captured close to *Cherburgh*. The ship had been condemned on a former day, and the present question was whether any distinction could be made in favour of the cargo, which was claimed on behalf of the house of *Simond* and Co. of *London*. It was stated, that at the time of the breaking out of hostilities considerable debts were due to the house of *Simond* and Co. from *French* subjects resident in the island of *Guadaloupe*, in consequence of which His Majesty's licence was obtained, permitting them, through their agents, to receive produce in payment of the debts, and that this cargo was a part of the produce so received, and was consigned to claimant's house in *London*, by their agents *Ardene* and *Guery*, of *Guadaloupe*.

Illegal destination of ship under order in Council 11 Nov. 1807—Ship condemned—distinction as to cargo over-ruled.

The
EXCHANGE.

JUDGMENT.

Dec. 6th,
1803.

Sir *William Scott*.—In this case the Trinity Masters who were called in as assessors to the Court, and upon whose judgment in matters purely nautical, it feels itself bound to rely, have given a clear and decided opinion that this ship, which had sailed from *Guadaloupe* with an asserted destination for this country, was at the time of capture attempting to enter the port of *Cherbourg* in violation of the blockade. The ship has been condemned, and the Court reserved the question respecting the cargo, to consider whether it could be exempted from the fate of the vessel. A representation had been made to His Majesty's Government on behalf of the house of *Simond* and Co. of this town, stating, "that at the time of issuing the orders for reprisals against *France*, considerable debts which had been contracted during the time the island was in our possession, were due to their house from *French* subjects resident in the island of *Guadaloupe*; and that there was no reasonable prospect of obtaining payment during the continuance of hostilities, except by employing neutral persons to receive produce in the island from those who were indebted to them, and to convey it from thence in neutral ships and under neutral papers, either to neutral countries, or to this country, on account and at the risk of the house in question." Upon this representation His Majesty's licence was granted to the parties, to enable them to extricate their property in the manner proposed, and under that authority, it is said these goods were shipped with an ostensible destination to *Hamburgh*, but actually consigned to the claimants in this country.

It

HIGH COURT OF ADMIRALTY.

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It is admitted that there is no imputation of fraud against the *British* merchants, and it is no improper partiality to say, that as a *British* case it carries with it every favourable presumption, because the crime would be of a highly aggravated nature, if a *British* merchant, under the shelter of an indulgence granted to him, should become the instrument of effecting the transfer of the enemy's colonial produce to *France*. The supposition is so monstrous, that it cannot be easily admitted, and therefore without meaning to cast any reflection upon the good faith of neutral merchants in other common cases, I say that as far as the mere presumption of fairness goes, it is certainly of high authority in such a case. On the general circumstances taken independently of the fact, that the ship was found out of her due course; and in such a situation as to furnish strong ground to suspect that she was going into a *French* port, I was and still am of opinion that they exhibit a fair case. The only circumstance affecting the masters' credit, is one that has been discovered since the decision on the ship, which is that he had in his possession letters directed to persons in different parts of *France*. This might possibly admit of explanation, but *prima facie*, it is conduct not only reprehensible, but criminal; he was not at liberty—he owed it to his employers not to carry on the correspondence of the enemy, and more especially in a clandestine manner. This has in some measure shaken the credit which I was before disposed to give him in an unlimited degree; but the strong fact is the situation of the vessel, which was found at day break within four miles of *Cape La Hogue*, standing directly for the *French* coast. It is perfectly clear that if that circum-

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THE
JURY
IN
THE
CASE

Since the jury received a preliminary explanation, it is of a nature to be taken into account in other pre-
sumptions in a case which is merely circumstantial,
and it is not to be understood that the jury, applying all
natural inferences to the facts, were of opinion
that the destination of the vessel could not be accounted
for on any supposition of a destination to this country,
I shall take it to be so. Certainly if this had been
left to a jury, and there had been no certain
evidence upon the point, I should, looking to the other
circumstances, have held this to be a fair case; but
these gentlemen were decidedly of opinion, after mak-
ing every allowance for wind and tide and the other
accidents of navigation, that the case was clearly made
out that the ship was going to a French port. That
is a subject upon which the Court can go very little
way in forming an opinion of its own, and it must act
upon the confidence which it places in the judgments
of those by whom it has been assisted, and whose in-
telligence in matters of navigation is sufficiently at-
tested by the situations which they now hold. This
being the case, I am only to consider whether there
are any circumstances which can exempt the cargo
from sharing the fate of the ship. It has been sug-
gested that though the ship was going to a French
port, it might not be for the purpose of delivering
her cargo there; but there is no rule which has been
more clearly established in principle, than that the
port of destination being an interdicted port, is the
port of delivery of the cargo. It is impossible to relax
that principle; if it were once admitted that a ship
may enter an interdicted port to supply herself with
water, or on any other pretence, a door would be open
to

The
EXCHANGE.Dec. 6th,
1808.

to all sorts of frauds without the possibility of preventing them. The Court applied the principle when it was first led to the consideration of cases of blockade, and there is none to which it has more inflexibly adhered. I am therefore to take the question with this condition, that the ship was going to a *French* port for the purpose of delivering her cargo, and I really know of no cases, except those which have been cited, where the owner of the cargo has been relieved from the penalty attaching to the ship. The cases cited, which are familiar to us all, were cases of a supervening illegality, where it was shewn that the owner of the cargo stood clear of any possible intention of fraud, and *that* by proofs found on board at the time of capture, and not supplied afterwards. For instance, where orders had been given for goods prior to the existence of a blockade, and it appeared that there was not time for countermanding the shipment afterwards, the Court has held the owner of the cargo not responsible for the act of the enemy's shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal. And the same indulgence has been exercised, where there was no knowledge of the blockade till after the ship had sailed, and the master, after receiving the information, obstinately persisted in going on to the port of his original destination. In both these cases the facts speak for themselves; *there can be no imposition*, the Court has only to look at the dates to satisfy itself of the purity of the owner of the cargo; but in this instance there must either be fraud in the *French* shipper at *Guadaloupe*, or the master has been guilty of an act of barratry. If the fraud is in the *French* shipper, it is
not

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not perhaps too hard a rule to hold the *British* merchant bound by his act, as he vouched for his integrity to the *British* Government; at the same time if the transaction has been conducted in a manner so different from the orders which were given, and these goods were really sent in fraud, the agents who violated those orders will be answerable to their employers. But suppose it to have been an act of barratry in the master, which I must confess I think quite incredible without the privity of the agent shippers, it is a misfortune for which a remedy must be pursued against him. Taking it, therefore, at all events to have been a fraud on the *British* merchants, I find an insuperable difficulty in giving any direct protection to their claim; if the cargo was going on a destination to a *French* port, in consequence of a breach of faith, either in the agents or the master, they are to indemnify themselves, by recourse against the wrong doer. I feel myself, therefore, under an obligation to follow up the judgment which has been given by the Trinity Masters upon that fact, and to apply it as well to the cargo as the ship.

ASIA GRANDE, ANTONIO JOAQUIM.

Dec. 6th,
1808.

THIS was a case on an objection to a report of the registrar and merchants, in which a reduction had been made in the sums demanded for agency on the part of the captors during the time this *Portuguese* vessel was in their custody. The ship was proceeding with a valuable cargo belonging to *Portuguese* merchants for the port of *Lisbon*, when she was detained with many others of the same description and brought to *England* to prevent her falling into the hands of the *French*, who were at that time in possession of *Portugal*. Upon the expulsion of the enemy from that country these vessels and cargoes were restored to the *Portuguese* proprietors upon payment of the captors expences, which then became the subject of reference to the registrar and merchants, and gave rise to the present question.

Agency—on objection to report of registrar and merchants—sum allowed by them increased.

JUDGEMENT.

Sir *William Scott*.—This is a question respecting the amount of the remuneration to which the prize agents are entitled for the trouble they have had in attending to these particular ships and cargoes after they were brought into port. The claim is made on behalf of two houses of agency here in *London*, and their substitutes at the out-ports; and the parties, on the other side, are the *Portuguese* proprietors of several ships and cargoes of great value, which were brought in under the embargo, and have since been restored, subject to a variety of expences and charges according to the particular circumstances of each case. The agent's charge amounted to from 30 to 50 guineas in the different cases, with 20 guineas additional for agency

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ASIA GRANDE.

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1808.

agency at the out-ports, but the registrar and merchants have cut down the several sums to 20 guineas for the whole. In general, the registrar and merchants have nothing to do with the question of agency, it is a matter which passes in private between the captor and his agent, and only comes before them incidentally in those cases of restitution, where the Court decrees that the captors expences shall be paid by the claimant. All agency is *pro opera et labore*, and the prize act fixes it at five *per cent.* as a fair average, but it gives nothing where the property is restored ; in such cases it is usual for the agent to charge a gross sum, which I understand is commonly 15 guineas for agency, and something extra for out-port expences. I perceive it is stated by the claimants in the act, that inasmuch as there has been no actual disbursement by the captor in this case, and he is not liable for agency where the property is restored, it is a demand which he can have no right to bring forward. This goes to a general denial of the fact upon which the demand is made, but I understand that where expences are decreed, the practice of late has been to allow this charge : when that practice commenced I cannot say, but I conceive it was settled on an understanding, that some person must be employed to take care of the property, and that the party who has finally the benefit is equitably bound to pay. • But this general objection has not been mooted in argument, and therefore it is unnecessary for me to dwell upon it now : I consider the practice to be sufficiently established, and that the registrar and merchants have proceeded on the general propriety and establishment of the rule. The care and attention of the officer who acted as prize-master in bringing home the ship, is represented in the act as highly meritorious, but that is a matter not connected with the

present question : and besides it appears that an allowance of five shillings *per diem* has been made to him, and accepted as sufficient on his part. If however the question had been still open, though I approve of what the registrar and merchants have done as acting upon a general rule, yet where ships of great value were brought into port during a very boisterous season of the year with turbulent crews on board, which made it necessary to employ persons of a higher station than usual, the Court would have been disposed to allow a more liberal subsistence. The act states the substance of the demands, with the grounds upon which they have been resisted ; and I am now to consider whether the Court shall not exercise a further discretion, and increase the allowance which has been made, without meaning in any degree to censure the award made by the registrar and merchants ; for certainly many considerations may come under the judgment of the Court, which it might not be proper for them to attend to. In the first place, I give no weight to the assertion that nothing is due ; because if agency has been allowed by practice equitably founded, it is as a general assertion not true. But to raise a ground for a greater allowance than has been customary, greater merit must be shewn, and therefore it is necessary to enquire whether there are any circumstances in this class of cases by which they are distinguished. In ordinary cases of justifiable seizure the captor has performed a lawful act ; he had a right to bring the vessel in, but it cannot be said that a service has been rendered to the claimant. It is true that it is a *damnum absque injuria*, but there can be no claim upon the gratitude of the parties, and therefore when the necessary expences are decreed to the captors, the Court is bound to see that it is done with the greatest strictness and œconomy.

But

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But the present class of cases are not of that nature ; here the capture was made not for the benefit of the captors, but of the captured. The common enemy had over-run *Portugal*, and an order for the detention of *Portuguese* vessels was issued by this government to prevent the property from falling into the hands of the enemy. There is something therefore in the nature of these cases which admits of a more liberal remuneration ; the agents of the captors have been the agents of the claimants, and where there is this fundamental distinction, it may be right to attend to other subsidiary considerations, some of which have weight. The property was held throughout, under a sort of divided possession, between the prize-master and the *Portuguese* master of the ship ; there was not an absolute possession as in the common cases of prize, and this circumstance was the source of some disagreements which have been the subject of frequent reference to the Court in consequence of disputes that naturally arose out of such a situation of things. This would necessarily occasion much additional trouble to the agents, to whom there must have been a perpetual recurrence for advice and assistance ; the length of time also during which this property continued under the direction of the agents, is another ingredient in the consideration. These are the distinguishing circumstances, though there are others, upon which, if I do not entirely exclude them, I shall not lay any great stress, as they are not peculiar to these cases ; at the same time the great value of the property, and the tempestuous state of the weather, must be admitted to enhance the trouble, and in a case fundamentally distinguished from others, may sustain a further demand, though they would not themselves lay the foundation for it. In ordinary cases it is said that one case balances another, but these are not cases
of

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of ordinary capture ; the property has not been proceeded against as prize, it was brought in *alio intuitu*, and might all have been put into the hands of government agents at first. In the cases of the corn ships detained last war, which have been referred to as cases of public capture, government allowed 15 guineas for agency, and five guineas for out-port charges, but there was the material distinction, that those captures were not made for the benefit of the claimants, but to prevent that species of supply from passing into the hands of the enemy. The case where government is dealing with its own agents, on ordinary terms, is not the same as where a benefit had been actually conferred upon the parties to whom the property belongs, and who are to bear the burthen of paying those by whose services they have been so benefitted. There was no ground for any claim upon the liberality of the captured ; and besides the number in those cases amounted nearly to 500. Here are only 15, and consequently the number will not make up for the deficiency of particular cases. Upon the whole, taking these various circumstances into view, although I very much approve what has been done by the registrar and merchants, yet considering that it is competent for the Court to encrease the allowance, at the same time that it is its duty to keep matters of this kind within the limits of rigid œconomy, I think I shall not deviate much from the rule of justice, if I allow one-third more. And in apportioning the sum, in consideration of the additional trouble which has been thrown upon the agents at the out-ports by the frequent references made to them, it appears to me to be proper to bring them more nearly to an equality with their principals than I should generally think right, and I shall therefore allow 16 guineas to the agents in town, and 14 guineas to their substitutes at the out-ports.

Dec. 27th,
1803.

NEMESIS.

Costs and damages
of a ship captured on
unjustifiable
grounds. — Navi-
gation Act not
extended to
Gibraltar.

THIS ship was captured at the entrance of the *Tagus* by the *Primrose* Sloop of War and sent to *Falmouth* where she was afterwards lost. The ship and Cargo were clearly *English* property, and it was urged, on the part of the claimants, that there being nothing to justify the detention it was a case for costs and damages.

JUDGMENT.

Sir William Scott.—This is an unfortunate case of a ship and cargo which were brought into *Falmouth* roads and there lost. The ship was captured on a voyage from *Gibraltar* to *Oporto*, with orders to touch at *Lisbon* for the purpose of delivering two pipes of wine, which were consigned to Sir Charles Cotton, the *British* Admiral upon that station; and, in case he found the *English* in possession of the place, the master was directed to obtain permission to dispose of his cargo there, consisting chiefly of articles of *British* manufacture, and such as were peculiarly adapted to the *Lisbon* market. There is no defect in the proof of property, as it clearly appears that both the ship and cargo belong to Mr. Tyrwhitt, an *English* subject residing at *Gibraltar*, where he holds the office of *Marshall* of the Vice Admiralty Court. Some observations have been made on the impropriety of a person in that situation being connected with shipping transactions, and it may be liable to objection; but that such an officer should be a trader of some species *cum gratia*, I presume, well be avoided, as such offices abroad do not frequently themselves afford a sufficient maintenance. It appears that the ship had been proceeded against at *Gibraltar*, and, on being restored,

was

was sold by her owner to a Mr. *Winter*, who again sold her to the present claimant. No objection has been made to the validity of the transfer, though there seems to have been some inaccuracy in the date of the bill of sale, but not of a nature to be made the subject of serious observation. It is said, that the vessel had no register on board, and that the captor was induced by this deficiency to make the seizure. I cannot bring myself to believe that he considered that as any justifiable ground for detaining the vessel, as he could hardly be ignorant, that being foreign built, she was not entitled to a *British* register. It has also been objected that she had not her proper proportion of *English* mariners on board, according to the provisions of the navigation act; that, however, is an objection which could not be noticed in this Court: if there was any irregularity in that respect, it would require to be referred to another branch of its jurisdiction. I am informed by those who are likely to be best acquainted with the subject, that it has always been understood that *Gibraltar* is not within the navigation act, and that ships belonging there are not subject to any restrictions which do not specially apply to that place; it is a mere military garrison, not a colony, plantation, or settlement. Indeed, in many of these possessions of the crown, such as *Malta*, *Gibraltar*, &c. it is absolutely impossible to comply with the regulations of the Navigation Act; for the requisite number of *British* seamen can by no possibility be obtained at such places. The Orders in Council, prohibitory of intercourse, as applicable to *Portugal*, were at an end at this time, for the *French* had evacuated the country, and the voyage therefore was not only innocent, but useful, contributing to the supply of the *British* fleet, and of our Allies, and possessing every title to favour

The
NEMESIS.

Dec. 9th,
1808.

The
NEMESIS.

Dec 9th,
1805.

and protection. What then is the treatment which this vessel, owned by a *British* subject, and coming with an avowed and notorious a purpose, receives from a *British* officer whose ship was, in fact, a component part of the fleet, and who was bound to do all in his power to encourage the bringing of those supplies which could not be procured from *Lisbon*, as that place had been long in a state of blockade? On first seizing the vessel he determined to carry her along-side the flag ship, which was lying at some distance in the *Tagus*, and as there was a complement on board for the Admiral, the measure would at all events have been proper, but he changes his mind, and the next day orders her for *England*. In those peculiar situations, in which gentlemen of the navy are often placed, having to decide and act in an instant on questions which are replete with difficulties that embarrass the Court itself, under all the advantages of a deliberate judicial investigation, it cannot but feel great anxiety to protect them, perhaps, sometimes even beyond what can be strictly reconciled with principle; but here was no difficulty at all, and if there had been any, the officer might have referred himself to his Admiral, who was close to him; acting under his orders he would have been protected. It is impossible to conceive the least shadow of an excuse for such conduct. Here is a *British* ship professing to come and evidently coming for the accommodation of the Admiral and the fleet, and for the supply of the city of *Lisbon*, now restored to its lawful sovereign; and yet upon such petty pretences as those which have been suggested, this gentleman forms the selfish determination of running away with the ship to make prize of her. She is sent for *England* in a most tempestuous season of the year, and continues waiting about for a week or ten days, 200 miles to the westward of *Lisbon*, during which period she sustains considerable damage from the equinoctial gales, and

and was at length under the necessity of putting into *Madeira* to obtain provisions, in order to proceed to *Falmouth*. The supercargo says that the captors questioned his right to go into *Lisbon*; with what propriety could that be done, when the place was actually in *British* possession? He then exhibited some bills of exchange that were drawn upon the *Admiral*, and asked permission to deliver the two pipes of *Marcella* wine, which were consigned to him in the manifest, but this also was refused, and in terms of insult almost reaching the *Admiral* himself. Such conduct is equally wanting in respect to the *Admiral*, and in justice to those who were the victims of it: nothing has been suggested that affords any apology, and it is therefore with the most perfect satisfaction that I pronounce this to be a case of costs and damages.

The.
NEMESIS.

Dec. 9th,
1808.

MERCURIUS, HARMENS.

Dec. 16th,
1808.

THIS was the case of a ship under *Bremen* colours, which at the time of capture was proceeding with a cargo of brandies on a voyage from *Bordeaux* to *Bremen*, but with directions to put into a *British* port for the purpose of obtaining a licence from this Government; and the question was, whether an actual destination to a port of this country according to those directions was sufficient to counteract the imputation of a fraudulent breach of the Order in Council, and the effect of a continuous intention.

The interposition
of a *British* port
held to take the
voyage out of the
intendment of
the Order
7 Jan. 1807.

JUDGMENT.

Sir William Scott.—I think I must take it as fully proved, that the intention of the party was to come to this country to obtain a licence to proceed to *Bremen* with the cargo, which, as coming from *Bordeaux*, could not otherwise be carried on. This fact is dis-

The
 11. 1813.

A. 1813.

closed in the papers, and is as strongly guaranteed as any fact can be; and to this I have to add, that the Court has every reason to presume that the application would have been made to Government in a fair, open, and unreserved manner. The parties have acted throughout *openly*, there is nothing to lead to a suspicion of dissimulous conduct. Then the question comes to this, whether such a voyage intended ultimately to *Bremen*, but first to this country, for the purpose of obtaining a licence, without which it was to be relinquished, is a continuous voyage, and therefore illegal? I think clearly not: it is a contingent voyage, depending upon the determination, not of the parties themselves, but of the *British* Government; if the ship went on at all, it was to be the act of the *British* Government. This is very different from the case of *American* ships touching at their own ports, to which it has been assimilated: here the voyage was to be continued only if legalized by the Government which would have a right to complain of the illegality; no two cases can be more unlike. The parties seem to have acted on a persuasion, perhaps too confidently entertained, that such a licence would be granted, misled either by some speculative reasonings of their own, or by some indistinct experience of what had been done in other cases. They might think that the employment of *British* agency in the transaction, and other advantages resulting from it to this country, might not be out of the view of the policy of Government. It has been objected to the cases of the licences which have been cited, that they were obtained under special circumstances, and that they do not support the inferences which the parties had drawn from them. But supposing their conclusions to be erroneous, yet if there was an honest intension on their part, it would be very hard to

visit such a case with the penalties of a fraudulent transaction. Where every thing was to be disclosed, and referred to the discretion of the *English* Government, the case cannot be put on a footing with a continuous voyage framed for the mere purpose of a literal evasion. Then it is said that no instructions were given to Mr. *Heyman* for the regulation of his proceedings here, in case the licence should not be obtained; *that*, might be an indiscreet omission, but it does not alter the case; he must then have written for instructions, or have done the best he could at his own discretion under the circumstances. Upon the whole, I see no reason to depart from the opinion which I expressed in the case of *The Minna, Traab* *; but that, it is said, was a case of circumstances, and so is every case of this sort a case of circumstances; and the party had a right to take his chance upon the circumstances of his own case, and to make his application to those who were to judge of the propriety of complying with it. As to any condition that might have been imposed by the *British* Government, how does it appear that they would not have been acceded to by the claimant? If not, there would have been no violation of law, the matter would have ended here, and the voyage have been brought to its termination in a port of this country. I cannot, under any view of the case, bring myself to regard it as a fraudulent continuous voyage; there was no act either done or to be done to found the imputation of fraud; on the contrary, there is sufficient proof of an honest intention to come to this country to procure the licence, and to act conformably to it when granted, and I shall, therefore, restore on payment of captors expences.

The
MERCURUS,

Dec. 16th,
1808.

Oct. 23, 1807.

* This was a case very similar to the present. The ship was captured on a voyage from *Bourdeaux* destined ultimately to *Bremen*, but with orders to touch at a *British* port, from whence she was to resume her voyage, if permitted.

Jan. 27th,
1809.

FORTUNA, KORDT.

Freight not due
to Captor on
goods not brought
to the original
Port of destination
though
afterwards sold
in this Country.

† 2 Sept. 1807.

THE question in this case was whether freight was due to the Crown on certain *Portuguese* goods on board this and other Danish ships which had been detained under the *Danish* embargo † and afterwards condemned to the Crown.

On behalf of the Crown it was contended—That these cases were strictly within the principle of a virtual election, as the cargoes had actually been sold in this country; and, although at the time of capture they might have gone on to *Portugal*, the claimants must have brought them back again as they would have arrived there on the eve of the irruption of the *French* into that country, and consequently that it would not have been an effectual arrival for the purposes of sale.

On the other side it was urged—That the contract of affreightment was not fulfilled in as much as these cargoes were not carried to their Port of destination, and that the grounds suggested were insufficient to shew a virtual election of the Ports of this Country.

JUDGMENT.

Sir *William Scott*.—I have no doubt whatever upon the rule to be applied to these cases, as it arises out of the general principle. It is a claim for freight on the part of the Crown, upon a supposed right of the captor, to whom the Crown is substituted, and whose right is derived from the owner of the captured vessel. It is possible that, *under certain circumstances*, the Crown may not succeed to all the rights of the captor, and still more possible that the captor may not succeed

to all the rights of the owner of the captured vessel ; But the first enquiry is, whether the owner would have been entitled to freight. He could have no right but upon an entire execution of the contract, or such an execution as he could effect consistently with the incapacities under which the cargo might labour. Where such an incapacity on the part of the cargo occurs, he has done his utmost to carry the contract on to its consummation ; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract is not performed. On the other hand, where the vessel itself is incapacitated, no right accrues to her owner ; he can have no right to demand that for which he stipulated only on the performance of his engagement. The general principle has been stated very correctly, that where a neutral vessel is brought in, on account of the cargo, the ship is discharged with full freight, because no blame attaches to her ; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo. In all cases, in which the captor has received freight, the contract had been consummated, and the goods brought to the original port of destination ; and to this rule the *Demarara* cases furnished not an exception, but only a fair application of the principle. In those cases the *English* owners made an affidavit in support of their claim, stating that they would have brought the cargoes direct to this country, but that they were obliged, by the law of *Holland*, to proceed first to a *Dutch* port, meaning afterwards to bring them on to *England*. It appeared, therefore, on the affidavits of the claimants themselves, that the ports of this country were those to which they would primarily and preferably have proceeded, if they

The
FORTUNA.

Jan. 27th,
1809.

THE
FORGONA.

JAN. 21st,
1809

they had been permitted; and, consequently, as the goods were in fact brought to their real, though not their actual destination, the Court was of opinion that the captors were entitled to freight. But these are cases of *Danish* ships that were going to *Portugal* with *Portuguese* cargoes on board, and were stopped. Why? - not on account of the goods, which at that time were entitled to a free passage to *Portugal*, but on account of the ships which were detained under the embargo on the commencement of hostilities between this country and *Denmark*. The ship was the subject of detention, not the goods, which might have gone on; and, therefore, the owner of the vessel had no right to say that freight was due, still less has the captor, or the crown. Whether, as the cargoes were brought into the ports of this country, the parties may have thought proper to dispose of them here, is a matter into which the Court will not enquire, because it lays aside all considerations of more or less advantage arising to the property from the change of destination: *that* is merely an accidental circumstance, which has no connexion with the principle upon which freight is given. It may happen that cargoes are sometimes brought to a more beneficial market in consequence of capture; but the Court will not institute an enquiry into such a fact, laborious in its process and uncertain in its result, when the only question is, whether the contract of affreightment has been fulfilled or not. But it is said that these ships were taken at a time when this country and *Portugal* were in a state of hostility, or rather of approaching hostility; and it certainly did happen afterwards, that in consequence of the unfortunate predicament

The
FORTUNA.

Jan 27th,
1809.

predicament in which that country was placed, the goods could not go on, but there was not an existing incapacity upon them at the time of capture; it was entirely owing to the ship that they were prevented from proceeding to the port of their destination. The Court sometimes looks to the circumstance of an approaching war, where the expectation of such an event appears to have guided the conduct of the parties themselves when the contracts were entered into, and in such cases it feels itself justified in applying the principles that belong to a state of actual war. But nothing of that kind appears in the present case; there is no part of the transaction that points to such an expectation, and, therefore, the mere existence of a state of things, verging to hostilities between the two countries, is a circumstance which the Court cannot take into its consideration.

No freight due.

March 12,
1809.

NEUSTRA SENORA DE LOS DOLORES,
MORALES.

Decree for costs
and damages—
Rights of civil
and criminal
the return of
peace, as the
being a civil
ing the interests
of war, declara-
tion of the law
before of trade
signs in the
court.

THIS was the case of a *Spanish* ship which had been captured before *Spanish* hostilities, and restored with costs and damages; but no further proceedings took place at the time, in consequence of the breaking out of the war between the two countries. An application was now made to the Court for a reference to the Registrar and merchants, on the ground that hostilities having ceased, the *Spanish* claimant was entitled to the benefit of the former decree for costs and damages.

In support of the Application Arnold and Swabey contended—That the *Spanish* claimant having obtained a decree for costs and damages, his right of action which had been suspended by the intervention of hostilities revived again upon the return of peace in the same manner as any other civil right.

Contra Adams.—It may be true that Municipal rights are only suspended by the intervention of war, but it is not so with respect to those rights that arise out of the law of nations; they are extinguished by war, which destroys all relations between the belligerent countries. The *Spanish* claimant does not now stand in the same situation relatively to this country, in which he stood before the war; he was then a neutral, he is now an ally, and therefore he is not restored to his original character. If the ship and cargo had remained in a port

of

of this country, the costs and damages might have enured to the Crown by a judicial proceeding as appendent to them on the breaking out of the war. But there was no such proceeding, and as war extinguishes all rights of this description, the Spanish claimant at all events can have no title.

The
NUESTRA SE-
ÑORA DE LOS
DOLORES.

March 1st,
1809.

In reply Arnold and Swabey.—The distinction which has been attempted to be made between municipal rights and those which arise out of the public law of Europe cannot be sustained. In both cases the effect of intervening hostilities is, that the parties are no longer able to prosecute their rights either in the Municipal Courts, or in those in which the law of nations is administered. As to the objection that the party is not restored to the same character as he is now an ally, if the one case could be more favourable than the other, he would not *a fortiori*, as an ally lose a right which he had before only as a neutral. It is said that if those rights survive at all they survive to the Crown; but that goes no further than the continuance of the war during which the Crown might have interposed its claim if it had thought proper. But where that has not been done, where no seizure has been made on the part of the crown, the right of property remains in the same state in which it was before hostilities; it is only a *jus ad rem*, of which the right does not vest of itself. The right to the thing is not extinguished by war; it is the power of suing for it which is suspended, and the cause of that suspension being removed, the party may now pursue his right in the same form and with the same effect as before.

JUDGMENT.

The
NEUSTRA SE-
ÑORA DE LOS
DOLORES.

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1809.

JUDGMENT.

Sir *William Scott*.—I am clearly of opinion that the objection is not sustainable ; it is true that the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace. This is an acknowledged principle in the Courts of Common Law, borrowed, in all probability, from the general Law of Nations, and I see no reason for any distinction here. We know that, in captures at sea, the general law is, that the bringing *infra præsidia*, and even a sentence of condemnation, is necessary to convert the property ; and although in some instances, positive institutions have determined that a possession of a certain number of hours is sufficient, yet this proceeds upon the ground that a possession of so many hours is an evidence of firm possession. Here there was no bodily possession, nor indeed could there be ; but still some judicial act might have been done declaratory of the forfeiture to the Crown of those rights which vested in the claimant under the decree for costs and damages. It appears, however, that no step was taken for this purpose on the part of the Crown ; and I am, therefore, of opinion that the rights of the *Spanish* proprietor do revive, and I refer it to the Registrar and Merchants to ascertain the amount of the compensation to which he is entitled under the decree.

BELLONA, VOLTZ.

March 1st,
1809.

IN this case a claim of joint capture was set up by a Revenue Cutter, on the ground of being in fight— There was no act of assistance, and therefore the only question was, whether the Revenue Cutter, upon the mere fact of fight, must necessarily be presumed to have the *animus capiendi* so as to entitle her to share.

Joint capture.—
Revenue cutter
not entitled to
share merely
on the ground of
being in fight.

For the Captor the King's Advocate and Swabey contended.—That a Revenue Cutter was to be considered as a private ship of war, and that the fact of fight, without co-operation, would not entitle her to share with the actual captor, which was in this case a king's ship.

On the other side Adams and Jenner.—It is true that the mere fact of fight will not entitle a privateer to share with a king's ship; because a privateer may choose whether she will pursue or not, and consequently the *animus capiendi* is not necessarily to be presumed. But Revenue Cutters stand upon a different footing, and cannot be classed in all respects with private ships of war. In the case of the *Active* *, which had been recaptured by an armed Revenue Cutter, a question arose, whether the recapturing vessel was to take a salvage of one sixth as a private ship of war, or whether she was to be considered as a king's ship. The Court in that case gave only a salvage of one eighth, and therefore if vessels of this description are to be considered as king's ships where it operates to their disadvantage, they are clearly entitled to the same character where it may have a beneficial effect. These vessels

* Adm. May 10,
1798.

The
BELLONA.

March 1st,
1809.

vessels are in the public service, they are a description of force relied on for the public security, and it cannot be said, because the protection of the revenue is superadded to their other duties, that the capture of the enemy is not their immediate duty.

The King's Advocate.—The case which has been cited, has been long over-ruled in this Court, which gives one sixth to revenue cutters, the same as to privateers in cases of salvage.

JUDGMENT.

Sir *William Scott.*—This is a question arising on the admission of an allegation, stating an interest, as joint captor, on the part of the *Falcon* revenue cutter, armed with a commission of war. I observe that there is no averment of actual co-operation, or that there was any indication of a design to co-operate in the capture; all that the allegation pleads is, the mere fact of fight, and therefore if this revenue cutter is entitled to share, it must be upon the ground of constructive assistance. It is a known rule of law, that the mere fact of being in fight would be sufficient to entitle a king's ship, because, in ships fitted out by the state, for the express purpose of cruising against the enemy, the *animus capiendi* is always presumed: but this presumption does not extend to privateers. In the one case the duty is obligatory; in the other, where private individuals make captures, at their own expence, they are engaged in a mere commercial speculation, to be carried into effect by military means, but dependant upon their own will in the particular acts and exercises of their authority; although they are authorized, they are not commanded to capture; it is a matter in which they are left to
their

The
BELLONA.

March 1st,
1809.

their own discretion. But these vessels, employed in the service of the Revenue, are a class of ships of an anomalous kind, partaking, in some degree, of both characters; they belong to the Government, and are maintained at the public expence; but it is not for the purpose of making captures from the enemy. On the other hand, they have commissions of war, but then these are private commissions, which impose no peculiar duties upon them; they are not bound to attack and pursue the enemy more than other private ships of war, and they are likewise unfavourably distinguished in this respect, that the advantages of capture are not held out to them, the interest of all captures made by them being reserved to the Crown. Primarily, their duty is to protect the revenue, and the capture of the enemy's vessels is engrafted upon their original character. All they derive from these commissions is, an authority to attack the enemy, in addition to other authorities that belong to their original and proper employment; on principle, therefore, they can only be considered as private ships of war. They are under no injunction to cruise against the enemy, and are employed generally for fiscal purposes: it is true that there is the addition of a military commission in time of war, but that does not designate them anew, it merely puts them on a footing with other private ships of war, and I shall, therefore, reject the allegation.

March 8th,
1809.

BELLE, BETTS, Master.

(Instance Court.)

Salvage not due to a king's ship, for rescuing from the hands of the enemy a hired transport employed in the same expedition.

THIS was an application for the salvage of a hired Transport, which had been deserted by the master and crew in the harbour of *Corunna*, and was brought out by Lieutenant *Fisher* of His Majesty's ship *Resolution*. The vessel had sailed with many others for *Corunna*, under the protection of several men of war, for the purpose of bringing away the *British* troops under Sir *John Moore*; and in executing that service she grounded in the harbour, where she was abandoned by the persons on board, from an apprehension of falling into the hands of the *French*, who were at that time investing the place.

In support of the Claim, the King's Advocate and Jenner.—This is a proceeding on the part of Lieut. *Fisher* to obtain some compensation for his trouble and risk in bringing off this vessel. It appears that about five o'clock in the afternoon of the 17th Jan. 1809, he was sent into the harbour of *Corunna* in the cutter belonging to His Majesty's ship *Resolution*, for the purpose of taking out troops from a transport which was on shore; but he found that the service had been performed by some other boats, and that the ship had been set on fire. He then observed the *Belle* lying in the harbour, and upon going to her, discovered that she had been deserted. Lieutenant *Fisher* immediately, with his boats crew, took possession,

tion, notwithstanding the shot from the enemy's batteries fell near the ship, and the wind having shifted sufficiently fair to enable him, though with some difficulty, to weather the rocks, he caused the cable to be cut, and made sail into the bay where he anchored near his own ship. The Master in his protest admits that the vessel would have been lost, but for the exertions of Lieutenant *Fisher*, who is therefore fairly entitled to some recompence for the service he has rendered.

The
Belle.

March 3th,
1808.

On the other side Arnold.—This is altogether an unprecedented demand; it is for the salvage of a transport in His Majesty's service, which was sent to *Corunna* with other vessels of the same description under the protection of several men of war, of which the *Resolution* was one. It was a joint service in which the men of war and transports were associated, and it happened that in the course of that service this vessel got into danger and was rescued by Lieutenant *Fisher*. But this was no more than his duty with respect to this or any other of the ships employed in that service whether the danger arose from the enemy or from any other cause. The transports were to take on board the troops, and the ships of war and of course the officers belonging to them were sent for the express purpose of protecting these vessels, and it was their duty to give every assistance in their power.

In reply the King's Advocate.—Although this vessel was a transport in His Majesty's service and employed for a particular purpose, she was still under the care of the master who was appointed by the owner. This was an act of dereliction on the part of the master

The
B-L-L.

Murcia 521,
1809.

and crew, and as the property was recovered for the owner by the exertions of this officer, he is entitled to some remuneration. It is true there was an association for the purpose of affording protection to these vessels, and so it is in the case of convoying ships which are nevertheless entitled to a salvage for the re-capture of vessels sailing under their protection.

JUDGMENT.

Sir William Scott.—This is a case of rather a novel nature; and in order to estimate the merits of the claim of salvage which is set up it is necessary, in the first place, to consider under what circumstances the desertion took place. It is stated that, upon her arrival at Carrizosa, the ship was warped in close to the town, and troops were embarked on board, under the orders of Lieutenant Debenham, the Agent for Transports; that next day, the wind having changed to the southward, and blowing with great violence, there was reason to believe that the transport, which was on shore in the harbour, could not be removed, and the troops were conveyed on board another vessel. It appears, therefore, that she was brought into this difficulty in the execution of a service, in which the men of war and transports were associated; and it was not till the unfavourable state of the wind made it improbable that she could be got off undisturbed by the enemy, whose batteries already commanded the harbour, that the Lieutenant thought himself justified in withdrawing his crew. Such an abandonment is no breach of duty; it was incidental to the service in which the vessel was engaged. The wind afterwards changed, and Lieutenant Fisher, who had gone into the harbour upon another errand, found means to extricate this vessel: no doubt he is entitled to great credit

credit for the manner in which he exerted himself; but, if he saw that it was in his power to bring the ship out, it was a part of his duty, and what he was bound to do. The praise of having discharged that duty, in defiance of whatever hazards may have attended the enterprize, will not be denied him; but it is impossible to mete out particular rewards for every danger and difficulty that is encountered by officers in the course of an arduous service. The withdrawing the vessel from the grasp of the enemy, at such a moment, was undoubtedly meritorious: but as to any claim, in the nature of salvage, it might as well be contended for wherever one of His Majesty's ships receives assistance from another in battle. The admission of such a principle would have the effect of converting every engagement into a struggle for salvage, and must be attended with incalculable mischief to the public service. I shall, therefore, reject the petition for salvage, and content myself with allowing the expences of bringing the matter before the Court.

The
BELLE.

May 8th,
1809.

March 22d,
1809.

PRINCIPE, ATHAELANTE.

Captor's expences allowed, deducting charges incurred by the ship in consequence of their misconduct.

THE question in this case was, whether the captors were entitled to their expences, which in the common course of these *Portuguese* cases had usually been allowed. The ship and cargo had been pronounced to be *Portuguese* property, reserving the question of captor's expences; and it was now objected that the captors were not entitled to that indulgence, as they had misconducted themselves, by carrying the vessel to an improper port, in consequence of which she sustained damage, and it became necessary to unliver the cargo.

JUDGMENT.

Sir *William Scott*.—This is the case of a *Portuguese* ship of very large dimensions, which was proceeding at the time of capture, with a cargo from one of the *Portuguese* settlements to *Lisbon*. The detention of the ship was at the time perfectly justifiable, as it was for the purpose of preventing her from falling into the hands of the *French*, who were then in possession of *Lisbon*. The Court has always held in these cases that the captors are entitled to full indemnification for any expences which may have arisen; and it is with pain that it ever feels itself compelled to deviate from the rule. But it would be carrying this indulgence of the Court much too far, to say that upon restitution of the property, the *Portuguese* owners should be answerable for expences wantonly incurred against all reason and judgment. It appears that the ship

The
PRINCIPLE.

March 22d,
1809.

ship was first brought into the Channel, under pretence of carrying her to a port in *England*, but that the prize master afterwards shaped his course for *Guernsey*, contrary to the representations of the master of the ship, who conceived that it was not a proper place for the reception of so large a vessel. It is no justification to say, that this was the port to which the privateer belonged, and that therefore it was the proper port to carry her prize to. That is not necessarily so; the first point to be looked to is the security of the vessel seized, and every one must see that the road of *Guernsey* was not a fit place for that purpose. The *Portuguese* master took the alarm, and called his crew together to protest, but still the captor persists in his intention of carrying this vessel into an open port in the winter season of the year. To say that every attention was paid to her security afterwards, is not sufficient; if she was put into a state of insecurity, that act cannot be purged away by any subsequent care during her continuance in so hazardous a situation. It was evident she could not remain there till the case was determined; and if any expence has arisen in consequence, it must fall upon the captors. It has been said that they offered to convey her to a port in *England* afterwards, and that the offer was refused by the *Portuguese* Master; but how was his consent in any degree necessary, when they had the ship in their hands, and under their controul? As far as I can collect the fact, it was thus: finding the ship was not in good condition, and that the capture was not likely to end in a condemnation, the captors were desirous of getting rid of the matter, and made an offer to the master to proceed to *Portsmouth*, on his own responsibility. Now if that was the proposal, if he was to take

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take the risk upon himself, it was an offer which he was not only not bound to accept, but an offer which it was his duty to reject. I am, therefore, of opinion, that the captors are not exonerated; and in granting them their expences generally, I shall disallow the expence of the unlivery of the cargo, which became necessary entirely from their own misconduct, in carrying this vessel to a place where she could hardly fail to receive some damage, and that too in opposition to the representations of the master.

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PROSPER, CLASSEN.

HOLSTEIN, JOBS.

Freight given to the crown as succeding to the rights of the enemy ship owners.—

Though not decreed prior to the breaking out of hostilities.

THESE *Danish* ships had been captured on a voyage from *Tonningen* to *Lisbon* with cargoes documented as *Portuguese* property, and ultimately restored as such.—The ships had been restored by consent in the first instance, reserving the adjudication of the cargoes and the question of freight and expences: it was now submitted to the Court that in consequence of the subsequent intervention of *Danish* hostilities these freights should be condemned to the Crown.

On the part of the Crown the King's Advocate and Swabey cited the clause in the Order in Council which directs "That all freight money due or payable to or on behalf of any person or persons, being subjects of *Denmark* shall be forthwith paid into the Registry of the High Court of Admiralty (except where bail is herein before directed to be taken for the same), there

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there to remain till His Majesty's pleasure should be further known, or until other provisions shall be made by law," and contended that although the decree for freight had not been made in the present instance, it was clearly due to the *Danish* owners of these vessels, and as such it must now pass to the Crown.

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Arnold, Adams, Jenner contra.—The clause in the Order in Council is limited to freight due or payable, which pre-supposes either an actual decree of the Court or a consent given on the part of the owner of the cargo, which is equivalent to a decree of the Court, for although it vests the right in a different way, the principle is the same. But where a right has not vested in the ship it cannot go to the Crown with the ship which was the subject of condemnation. This approaches to the case of capture where freight is not payable as of course to the captors having condemnation of the ship; but is decreed by the Court upon its being shewn that the cargo has been brought to the port of destination. The question is reduced to this, whether the Crown succeeds to all rights which would have enured to the *Danish* Master if he had continued neutral, or to those only which were vested in him at the time hostilities took place. When it is said that the Crown succeeds to all the rights of the *Danish* Master it must be limited to vested rights; there might be rights against the ship on behalf of third persons; a right of action for instance on a bottomry bond, and it would be impossible to contend that the Crown has all the rights of the *Danish* Master, and yet has no part of that *onus* which he would be obliged to sustain.

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The King's Advocate and Swabey, in reply.—
The rights did vest in the *Danish* Master till they were divested by the Crown; this is not a proceeding to exact a debt due to a ship of an extrinsic nature, as for instance, a former freight or any other right accruing to the *Danish* master extrinsically, *quo ad* the subject of the present capture. But the question is, how much of the property, now under the custody of the Court, is to be considered as *Danish* and how much as *Portuguese*. The cargoes were in the custody of the Court, and there comes an order directing that all *Danish* property shall be detained. The words are, “That no property appearing to belong to any subject of *Denmark*, respecting which proceedings are now depending or shall hereafter depend in any of His Majesty's Courts of Prize shall be decreed to be restored.” Now this is a property under proceeding. It is a demand on the cargo to pay the freight; it is a right or species of property with respect to which the ship has a lien where there is no obstruction to such demand from collateral circumstances. The Court would, in this instance, have decreed it to the *Dane*, and it is therefore property which the Crown may attach as well as any other. In this view this is not a question, whether the Court would proceed to exact an extrinsic debt due to the ship; it is a mere question as to the apportionment of the property waiting the judgment of the Court. In the subsequent clause of the Order, the words, “All freight money due or payable,” are to be taken without limitation to property actually vested by a decree of the Court. But in this very clause there is an exception referring to a former part of the Order, where it is directed that under certain circumstances “goods laden in or
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consigned

consigned to the ports of this country shall be delivered up to the laders or consignees, upon bail being given for the payment of the freight into Court," so that the Order looks generally to the payment of freight under contract, and not merely under the decree of the Court. There could be no reason for such a distinction, because the difficulty of ascertaining whether the freight is due at all is not greater than the difficulty of ascertaining the amount where the decree that it was due had passed; in either case the claimants of the cargo would equally have the benefit of whatever they might have to offer in the way of objection. The Court has not been in the habit of restricting its decrees to freight already pronounced to be due, it has occurred in many recent captures of *Danish* vessels under the embargo, that where the cargo has been condemned to the captor, as enemy's property, freight has been given to the Crown against the captor. It is also to be considered, that this was a preliminary order for the preservation of property then only embargoed, till His Majesty's pleasure should be further known; if the embargo had gone off, the *Dane* would have been entitled to receive the freight. Indeed the *Portuguese* claimant will be bound to pay him now unless he is exonerated by the sequestration of the *English* Government. The Court of Admiralty cannot extinguish the debt by any other means, than by assigning it to the Crown as property seized.

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JUDGMENT.

Sir William Scott.—In objection to this demand for freight, on the part of the Crown, it is said that it will operate with a considerable degree of hardship upon

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upon the owners of the cargoes in these cases, if the demand is acceded to ; on the other side it has been pressed, with equal earnestness, upon the consideration of the Court, that, unless the strict rule is applied, there will not be funds sufficient in the hands of the Crown to remunerate the captors. These are considerations to which I shall pay very little attention, as they can have no influence in the decision of the question : the Court must proceed upon general rules, and it will sometimes happen that general rules press hard in individual cases ; on the other hand I am not to look to a possible deficiency of the fund for answering other purposes. It is my business to apply the law to the case itself, and I have only to consider upon what principle of adjudication this question is to be determined. These *Danish* ships, which had not been brought in upon their own account, were restored by consent, reserving the question of freight and expenses ; and the cargoes which stood over for adjudication, have since been given up to the *Portuguese* claimants, in consequence of the favourable change which has taken place in the situation of that country. It is clear that these cargoes were not originally destined to this country, and, by the general law-merchant freight would not be due, because the contract of affreightment has not been completed. But in this Court it is held, that where neutral and innocent masters of vessels are brought into the ports of this country, on account of their cargoes, and obliged to unliver them, they shall have their freight, upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. This rule was introduced for the benefit of the ship owners,

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and to prevent the rights of war from pressing with too much severity upon neutral navigation. Now it happens that, in consequence of *Danish* hostilities, these freights have become enemy's property; and the question is, whether the right passes over to the Crown. By the Order in Council, which directs that freight due, or payable to *Danish* subjects, shall be paid to the Crown, it is decided that it does; but a distinction has been taken in this case, on the ground that there having been no declaratory sentence, there is no vested interest. It is contended that the freight is a chose in action, and can only be recovered by a suit at law: and that here the *Danish* owner, having become an enemy, he cannot pray a sentence, and the right remains extrinsic. Now it is certainly true that the captor, which is the Crown in this case, does not acquire extrinsic right, more than it would become subject to to any extrinsic burthens, which might attach to the ship; and therefore, if this is an extrinsic right, it will dispose of the question. The first question then is, whether it is to be so considered or not; now, undoubtedly, when a ship is brought in, and arrives at what is legally considered as her port of delivery, the right to freight is not extrinsic. The master is not bound to establish his right by a proceeding at law; he has possession of the cargo, and has a right to retain that possession till his demand is satisfied; and this forms a material distinction from those other rights, in which the intervention of a Court of Justice is required. It is just the same with respect to the obligations of the vessel; if one of these ships had been in a private dock, for the purpose of being repaired, the Crown could only have made the seizure, subject to the detainer for repairs. But it is said, that here there could be no corporal

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poral apprehension, because these cargoes had been separated from the ships; but in what manner had they been separated? why, by substituting bail for the bodily possession of the cargo. This is done merely for the convenience of the parties, and is by no means intended to place the owner of the ship, who has a lien upon the cargo, in a worse situation; the Court merely substitutes one security for another, it changes the nature of his security, but does not lessen it. Suppose the Crown had seized the ship, with the cargo on board, there can be no doubt that it would have been entitled to the freight, for the *Danish* master was entitled, and might have retained the cargo till he was paid; and unless it can be said that this practice of taking bail alters the nature of his right, so as to deprive him of his legal remedy, he must be considered, in point of law, though not in point of fact, as still in possession of the cargo. Taking it, therefore, that the *Danish* master, when here, was entitled to the freight, the Crown, which is substituted for him, has the same right; and I do not see that the mere absence of a declaratory sentence imposes any additional hardship upon the owner of the cargo. It has been said, that he might have shewn cause against the *Danish* master, so he may now; and with more advantage against the Crown than against the *Danish* master, who was in possession of more facts to meet any objections which might have been made to the payment of the freight. And although I wish to press with as light a hand possible on the owners of these *Portuguese* cargoes, yet, considering that there was no necessity for a declaratory sentence, and that this was a vested interest, of which the *Danish* master was in possession, and of which he was not deprived by the mere substitution of the bail, I am of opinion that the Crown is entitled to the freight.

LORD NELSON.

April 18th,
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(Instance Court.)

This *English* ship had been captured by a *French* Privateer and was afterwards deserted by the Enemy, under an impression that it was impossible to carry her into Port. The ship was found without any person on board, and brought in by the *Cherokee* Sloop of War; and the question therefore was, whether this should be considered merely as a case of salvage on recapture or as a derelict?

Capture by the *French* and subsequent voluntary abandonment—Salvage not limited by the Prize act.

On the part of the Salvors Swabey contended—That this was not a recapture within the meaning of the Prize Act, as the ship had not been abandoned from the terror of His Majesty's arms. That the master and crew were taken out and the vessel deserted by the enemy on account of her disabled condition, as appeared by an affidavit made by the Commander of the *French* Privateer, who had been subsequently captured. That it was a case of great merit on the part of the *Salvors*, and that the Court would give salvage as of a vessel deserted at sea and in danger of being lost.

JUDGMENT.

Sir William Scott.—This is a question of salvage for the recovery of this vessel, which was a transport in His Majesty's service, and valued at about £. 4600. The circumstances of the recovery are these; the ship had been pursued for some time by a *French* lugger, and the master finding it impossible to escape, with the intention that the enemy might not make prize of her, cut
away

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away his masts, which were in the act of falling when the lugger came up. On this account the enemy avoided boarding, but ordered the master to strike his colours, and lower his boat into the water; they then took out the master and crew, and leaving this vessel to her fate, proceeded in chase of another which was in sight. Here then was a total abandonment of their inchoate rights as captors, not under the terror of any *British* force, but solely as it appears in consequence of this act of the master. Suppose, therefore, that after this voluntary abandonment, the ship had been met with by some *French* cruizer, and that by means of jury-masts they had succeeded in carrying her into a *French* port; can there be any doubt that she would have been prize to the second captor? There was a total extinction of the rights of the first captor, who had quitted the prize upon finding he could not carry her into port, and having at the same time another object in view better worth his attention. There was no application of force or terror; it was a voluntary quitting, and the ship was, therefore, found in the situation of a derelict, abandoned by all who could pretend to any right in her. There appears, moreover, to have been great merit in the exertions of the persons by whom she was recovered; it was a work of great labour, and apparently of much skill, not unaccompanied with danger, and as I am not restricted by the Act of Parliament in this case, I shall allow one moiety as the proper salvage.

The KING v. WAYTH.

May 20,
1809.

THIS was a proceeding on the part of the Admiralty against *Francis Wayth* master of the merchant ship *Cynthia* for disobedience of signals and the lawful orders of the commander of the convoy, in breach of the act of Parliament which provides that “if the Captain of any merchant ship under convoy shall wilfully disobey signals or instructions or any other lawful commands of the commander of the convoy without notice given and leave obtained for that purpose, he shall be liable to be articted against in the High Court of Admiralty at the suit of the King in his Office of Admiralty for disobedience to the officer of the convoy, and upon conviction thereof shall be fined at the discretion of the said Court in any sum not exceeding five hundred pounds, and shall suffer such imprisonment not exceeding one year as the Court shall adjudge.”

Disobedience of
signals while
under convoy.—
Proceeding under
the statute.

45 G. 3. c. 72.
s. 24.

JUDGMENT.

Sir *William Scott*.—There is no branch of the service more unpleasant to naval officers than that of convoying a fleet of merchant vessels; it is a duty which is painful in its own nature, and extremely difficult in its execution, even where there is no misconduct on the part of those who are to act under their orders. It must frequently happen, that among the different vessels confided to their care, some are navigated by unskilful masters, or they sail badly from some fault in their own structure, and are not capable of paying prompt obedience to the signals that are made; and therefore officers bringing with them the best disposition to the service, usually find that they have difficulties enough to struggle with. But if these difficulties are to be aggravated by the disobedience and

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contumacy of the persons they are to protect, it makes it a duty which hardly any man can take upon himself without a certainty of failure, and cannot terminate otherwise than in a way fatal to the interests of commerce. This has been so frequently a subject of complaint, that at length it has been found necessary to arm the court with very extensive powers for the prevention of the evil, and as this is the first prosecution under the statute, it imposes an especial obligation on the court to mark it in such a manner as shall give effect to the intentions of the legislature. It is a case not merely of disobedience, but of active opposition to the orders which were given, aggravated by the most gross and insolent language. In the articles it is charged “ that the *Cynthia* sailed with other vessels
“ on the 26th Sept. 1805, from *Newfoundland* for
“ *Portugal*, under convoy of the *Harpy* sloop of war, and
“ the *Pilchard* schooner: that on the 8th of *October* fol-
“ lowing the *Harpy* being a-head, leading the convoy
“ and the *Pilchard* close upon her weather quarter, at
“ the distance of about one hundred fathoms only, so as
“ to render it dangerous for any other vessel to pass be-
“ tween them, it then blowing fresh; Lieut. *Crew*, who
“ commanded the *Pilchard*, seeing the *Cynthia* coming
“ up astern, in order to pass between the *Harpy* and that
“ vessel, hailed the said *Francis Wayth*, the master of the
“ *Cynthia*, and ordered him to go to leeward of the
“ *Harpy*, and not to pass between them; that the said
“ *Francis Wayth* made no answer, but waved his hand
“ as a direction to Lieut. *Crew* to get the *Pilchard* out of
“ the way of the *Cynthia*; that Lieut. *Crew* finding
“ that no attention was paid to his order, directed a
“ musket to be brought on deck for the purpose of
“ enforcing obedience; on seeing whereof, the said
“ *Francis Wayth* cried out I have muskets as well as you,
“ and

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“and immediately sent below for one which he loaded;
 “and soon after he had passed between the convoying
 “ships he discharged it.” It is further stated, that “on the
 “afternoon of the same day, in consequence of a signal
 “made by Capt. *Heywood* of the *Harpy*, Lieut. *Crew*
 “hailed the *Cynthia*, and desired the master to shorten
 “sail, and close, when he again replied in a very insult-
 “ing manner, and made more sail than before, in con-
 “tempt of the orders communicated to him.” These
 are the facts charged, and they are fully established
 by the evidence; in answer to them the party has at-
 tempted to defend himself by pleading facts which are
 not supported, and which he must know could afford
 no justification of his conduct. He has given in an
 allegation, in which he states, that he could not
 comply with Lieut. *Crew*’s orders to go to leeward of
 the *Harpy*, without danger of running foul of that ves-
 sel; but there must be an end of all discipline, if
 masters of vessels under convoy, are to take upon
 themselves the office of determining whether the orders
 that are given them are to be obeyed or not, when the
 very nature of the service is such, that it can only be
 performed by prompt and willing obedience. Here
 on the contrary was a studied opposition on the part of
 the master of this vessel, to the orders of the officer of
 the convoy, and how is it extenuated? Why, after a
 lapse of four years, at this late period, at this eleventh
 hour of the day, he comes forward, and expresses
 himself in terms of humiliation. But during all this
 time he has been standing out, although he had nothing
 to do but to throw himself on the mercy of the Admi-
 ralty. It is proved, however, that upon a former
 occasion, he conducted himself in a very exemplary
 manner; this weighs something, and as the prosecution
 has been pending a long time, and it is the first under

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the statute, I shall content myself with condemning him in the full costs of suit, and in the penal sum of 50l. to be paid to his Majesty in his office of Admiralty.

May 2nd,
1809.

KING v. FERGUSSON.

A person appearing for the captain on granting letters of marque makes himself responsible.

IN this case the Judge decreed a monition against *Alexander Fergusson*, as commander of the private ship of war, *Lucy*, *Gregory Geering*, who appeared for him, *Henry Hobbs*, and *William Ransom*, his sureties, on granting him letters of marque, citing them to appear and see proceedings had against them, and to shew cause why the bail recognizance should not be decreed to be forfeited for a breach of his Majesty's instructions. The act of parliament requires that upon granting letters of marque, the Captain and two sureties shall appear and give security; but on considerations of convenience, where the Captain is absent, the practice of the Court permits some other person to appear for him.

Swabey on the part of Mr. Geering contended—That only the two sureties were bound, and that when *Mr. Geering* appeared on behalf of the Captain, he did not bind himself personally, and that therefore he ought to be relieved.

On the other side it was urged by the King's Advocate, —That the bond must be interpreted by its own tenor, and not by extrinsic evidence. That *Mr. Geering* had personally bound himself by the terms of the bond, and the Court could not exonerate him, and lay the burthen upon the other two.

JUDGMENT.

JUDGMENT.

Sir *William Scott*.—The question in this case is, whether the security given, is to bind the captain, or the party who appears on his behalf. Now it is clear that Mr. *Geering* could not by any act of his bind the captain, from whom he had no authority; and there is no intimation in the bond itself that he intended to do so. In the act of parliament it is specified that the master and two sureties shall give security; if therefore, the substitute cannot bind him, and does not bind himself, there is a want of one of the three sureties required, and the provisions of the act are not complied with. In the description, it is true Mr. *Geering* appears on behalf of the captain, but what is the obligatory part of the bond? “They do all severally consent that execution shall issue forth,” against whom? not against the captain, but “against themselves, their heirs, executors, and administrators.” It is for the parties to consider well before-hand how far they are willing to incur that risk, and if any inconvenience arises from the practice, it may be altered; but I cannot venture to say, that the undertaking by which Mr. *Geering* submitted to bind himself, does not bind him.—
Recognizance forfeited.

The KING
 v.
 FERGUSON.

May 27^d,
 1809.

May 10th,
1809.

THE BALTIC MERCHANT, SMITH, Master,

(Instance Court.)

West India voy-
age not termi-
nated till the ar-
rival of the ship
in the *West In-*
dia Docks.—
Wages incurred
for desertion.

THIS was a proceeding on the part of *Christopher Wheldon* to recover a sum of money due to him for wages earned on a voyage from the port of *London* to the *West Indies* and back. The demand was objected to on the ground that he had quitted the ship before the voyage was compleated.

In support of the demand the King's Advocate.—This is the ordinary case of a mariner quitting a ship after her arrival in port, without a regular discharge in writing. The ship is a *West India* ship, and had arrived off the *Orchard House*, within half a mile of the *West India Docks*, and there *Wheldon* went on shore. If any penalty be incurred it is only a forfeiture of one month's pay to *Greenwich Hospital*, by the 2 *Geo. 2. c. 36. s. 6.* It was so decided in this Court in the case of the *Hibberts* (Nov. 1807.) and also in the Court of C. B. in the case of *Frontine v. Frost* (3 *Bos. and Pul. 302.*) The mariner's contract is irregular, because it has not been signed by the master, and as no tender has been made on the part of the owners they are liable to costs.

For the Owners Daubeny.—This is clearly a case of desertion during the voyage, whereby a forfeiture of the whole wages has been incurred, as well by the general maritime law, as by the statutes 2 *Geo. 2. c. 36. s. 3.* and 37 *Geo. 3. c. 73.* A ship has not compleated
her

her voyage until she is moored for the purpose of discharging her cargo. It is not material how small a part of the voyage remains to be performed; no distinction in that respect can be taken. It was so held in the case of the *Pearl, Denton* (5 *Adm. Rep.* 224.), which was a case of peculiar hardship on the mariners who quitted the ship; but the Court could not relax the rule of law. This ship is engaged in the *West India* trade, and is bound by the statute (39 *Geo. 3. c. 69. s. 87.*) to discharge her cargo in the *West India Docks*. This, therefore, must be considered the termination of the voyage, and the port of destination, for the voyage continues till the ship has been safely moored in the docks. The mariner's contract, which describes the voyage to be "back again to the *West India Docks* is decisive of the question;" with respect to its not being signed by the master, that is not required by 37 *Geo. 3. c. 73.* which regulates the *West India* trade, neither is it customary for him to do so. The act of *Geo. 2.* had two objects in view. By the 3d section a forfeiture of the whole wages is incurred in case of desertion before the completion of the voyage, and by the 6th section the master is authorized to deduct one month's pay if a mariner quits his ship after it is moored but before the cargo is unladen and without a discharge in writing. The case of *Frontine* and *Frost* was decided on other grounds. The defendant did not prove a desertion without leave which the Court said he was bound to do. The case of the *Hibberts* was totally different from the present one. The crew were hired on a voyage from *Halifax* to *London*; the ship arrived in the river, and was safely moored above the *West India*

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Docks, when the mariners left it. Four or five days afterwards the officer of the customs interfered, and obliged the master to carry his ship to the *West India Docks*, because he had some *West India* produce on board. Under these circumstances it was said by the Court not to be a desertion *during* the voyage, but as the mariners had quitted the ship without a discharge in writing it was held that they had incurred the forfeiture in that case provided, of one month's pay. But in this case there was an actual desertion *during* the voyage, and consequently a forfeiture of the whole wages has been incurred,

JUDGMENT.

Sir *William Scott*.—This is a suit for mariner's wages, instituted by a person who was hired on board this vessel in the capacity of carpenter. In a summary petition which has been given in on his part, he states "that the ship being in the port of *London*, and designed on a voyage from thence to the island of *St. Vincent*, in the *West Indies*, and back again to the port of *London*, where her voyage was to end and be complete, he was engaged by the master to serve on board the said ship as carpenter for and during the aforesaid voyage, and until her return to the port of *London*." He then states "that he accordingly failed to *St. Vincent's*, and returned with the vessel to the port of *London*, where she was safely moored on the 19th Aug. 1808; that the voyage was thereby fully complete and ended, and that on the same day he was discharged from the service of the said ship." He asserts therefore these two facts, that the ship was safely moored, and that he was discharged from his service :
and

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and in proof of these assertions, two of the mariners have been examined, one of whom, *Peterfon*, the cook, merely states "that the ship arrived in the port of *London*, and was safely moored, whereby the voyage was compleated;" the other witness, *Henry*, goes somewhat further, his account is, "that on her return to the port of *London*, the said ship was safely moored along side another ship, and her sails unbent, and that the said *Christopher Wheldon* left her, and went ashore, and he never afterwards saw him on board the said ship." There the case is left, they do not attempt to aver that *Wheldon* had received any discharge, but it turns out on the evidence of two very unexceptionable witnesses, the mate, and *Bowie*, the river pilot, that this mooring of the vessel, as it is called, was nothing more than lashing her along side another ship off the *Orchard-house* below *Blackwall*. Now undoubtedly that is not a mooring in the proper sense of the word, which implies the fixing a vessel by chains or anchors in a permanent manner; it was merely a temporary suspension of the voyage, by attaching her to an object that was also moveable, and depending, not upon the will of these parties or of any body with whom they are connected, but upon the will of others, the persons in command of that vessel. In the case of *Frost* and *Frontine* which has been alluded to, and which alone has occasioned a suspension of my judgment, it is laid down, that it is not necessary for a mariner to prove his own discharge: that is thrown upon the other party, and therefore the defect of proof upon that point, would not prejudice the present claimant. But here it is directly proved by the mate, not only that he was not discharged,

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discharged, but that leave to go on shore was positively refused him. The mate says, "that in the afternoon of the said 19th of *Aug.* after he was left in command of the said ship by the said *Joseph Smith*, the master, a woman, whom he understood to be the wife of the said *Christopher Wheldon*, came to, and addressed herself to the deponent on deck, though he cannot say whether in the hearing of the said *Christopher Wheldon*, or not, he being not far off, and then asked for deponent's leave for the said *Christopher Wheldon* to go ashore. And deponent then in reply thereto, told her as was the fact, on account of the said ship not lying in a safe place, that he could not give leave to any person, meaning any of the crew of the said ship, to go ashore." And he then states, "that having left the deck of the said ship about four o'clock in the afternoon of the said 19th day of *August*, to get some tea below, he found on his return on deck, that the said *Christopher Wheldon* had, without giving the least notice in his presence to the master of the said ship, or to any other person, and in particular without giving notice to the deponent, who was left in the command of the said ship, left and deserted the said ship. And he did not see him again, till two days after the ship had been carried into the *West India Docks*, where, by her being moored within the said docks, the voyage was complete and ended. The pilot also says, "that in consequence of the desertion of this man and others, the ship was exposed to considerable danger in the situation in which she was, and particularly from her being without a carpenter:" so that here is a desertion of the ship, as complete in point of fact, and as alarming in its consequences, as

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can well be imagined. It appears that the owners were obliged to get other assistance to work the vessel up to the West India Docks, at which place alone she could deliver her cargo, and which must be considered as the proper termination of the voyage. The question then is as to the *penalty*: if the word penalty is that which properly belongs to this act of misconduct. That such a demand as this, for entire wages under such conduct on the part of those who claim them, could have been at any time supported, is inconceivable: if owners are damaged by the misconduct of their mariners, they are entitled upon every principle of reason and justice to a set off against the demand of wages, on account of the hazards to which their property had been exposed by the non-performance of the contract. By interpretation of law, the voyage is not completed by the mere fact of arrival; the act of mooring is an act to be done by the crew, and their duty extends to the time of the unlivery of the cargo. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore, and therefore the law, not only the old law, but particularly the statute by which the *West India* trade has been in later times regulated, has enjoined in the strictest manner that the mariners shall stay by the vessel until the cargo be actually delivered. I take this to have been always a part of the duty of mariners, their contract is legally understood to go this length, and there never can have been a time when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not in *modum pænæ*, but it is a civil

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civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject. In the case of freight, if a master does not execute any part of the contract, it is in strict principle a forfeiture of the whole freight, and so it would be in these cases of wages, though the law has not usually been carried to its full extent; but from that indulgence with which it has always contemplated the interests and even the errors and failures of this class of men, it has wrought only the forfeiture of a part of the wages by way of compensation to the owner for the trouble and risk of the exposure of his property, and for his additional expence in procuring other assistance to effect that which ought to have been effected by such deserters. Then came the statute of merchant seamen, which contained a clause, giving one month's wages to *Greenwich Hospital* in cases of desertion, and in the argument which has been founded I presume upon the case alluded to, it is urged as if it was understood to transfer part of the forfeited wages to that institution. But surely it never could be the intention of the legislature to make that a matter of charity to *Greenwich Hospital* which was already a matter of justice due to the injured owner. It would be a strange remedy to hold out to the merchant owner, who was defrauded of the service of his mariners by their desertion, and who had his equitable right of deducting from their wages on that account, to inform him that now he should no longer have his right of set-off against these delinquents, but that the wages should go as a forfeiture to *Greenwich Hospital*. That would be to double his injury. The case of *Frontine* and *Frost* produced a great deal of deliberation

liberation among the judges of the Court in which it was considered ; and it was there laid down pretty strongly in the argument of council, that the delinquent does not forfeit the whole of his wages, which is true. But it was further argued that the master must have debited himself to *Greenwich Hospital* in order to entitle himself to make the deduction, on the ground that the deduction is for the benefit of that charity, and not for the compensation of the owner. Now I take the interpretation of the case to be this, that it will not entitle the owner to set off the forfeiture to *Greenwich Hospital* as a forfeiture under the statute which he had done in his pleadings, unless he shall have complied with the requisitions of the statute, not that he shall lose his own right of deducting a compensation due to himself personally on account of the imperfect execution of the contract. I have had opportunities of conversing with very learned persons who were interested in that judgment, and from whom I understand that the authority of their opinions concurs in sustaining the proposition that the owner is not debarred by the provisions of the statute, from those rights to which he was entitled under the old law. The legislature never could have intended to deprive the owner of his remedy, when it superadded this forfeiture in favour of the hospital, which was to be obtained in the modes it has prescribed. This case does not, I think, in any manner interfere with the principle which I have laid down, that the owner is at liberty to set off the compensation to which he is entitled against a demand for wages independently of that statute. But the present case goes a great deal further ; it is true the vessel had arrived in the river,

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but the voyage was not finished, it was still to be prosecuted. The acts which have passed, having made the *West India Docks* the only place where these cargoes can be discharged, the voyage can only terminate there; the vessel has not, till then, arrived at her final moorings. Her port is not the port of *London*, generally, but of that particular portion of it which is expressly and exclusively appropriated for the reception of *West India* ships. It is, therefore, a desertion during the voyage, which by the old law, as well as by the statute, works a forfeiture of the whole wages, and it is a case of a very flagrant nature. The mate says, that being safely moored in the *West India Docks*, her voyage was complete and ended, and no doubt that is the right interpretation. The mariner's contract has been exhibited, which is drawn up in a very slovenly manner, and it has been suggested that the words *West India Docks* may have been put in afterwards; be that as it may, the port of *London* must in this case, be taken to mean the *West India Docks*, because it is there alone that the cargo could be delivered under the statutable regulations.

Wages forfeited.

TWEЕ GEBROEDERS, JANS.

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1839.

THE question in this case was, whether this *Dutch* ship, and cargo, were protected by a *British* licence found on board, in which the parties had themselves substituted *St. Martin's* for the port of *Bordeaux*.

Licence vitiated
by changing the
port of shipment.

JUDGMENT.

Sir *William Scott*.—This ship was taken, on a voyage from *St. Martin's* to *Dover*, with a cargo of salt, under a *British* licence on board which has evidently been altered. It is admitted that the licence was obtained for the avowed purpose of bringing away a cargo from *Bordeaux* to any port of this country; but the parties having, for some reason or other, changed their intention, it had been altered so as to accommodate it to the present voyage, and this without any communication with His Majesty's Government. It has been said that specific licences were at the time obtained for the purpose of carrying on this trade from *St. Martin's*, and that the deviation cannot, therefore, be considered as contrary to the policy of Government; but I cannot consider that as a sufficient excuse, such an alteration can only be made upon a particular representation, leaving Government to judge of the terms on which it may be proper to comply with the request. What is the ground of the policy of granting licences at all, but that Government may see what communication is going on with

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with the enemy? And, therefore, I do not think that a case, in which the real port is not disclosed, does come within that latitude of interpretation which the necessities of commerce might tolerate. If there was no difficulty in obtaining licences for this trade in salt, why was not a disclosure made by the parties of their real intentions? It is said, that this salt was to be carried on to Hel'and; and certainly *prima facie* the importation of *French* salt into that country is not a commerce which is entitled to any very favourable consideration. There may, at the same time, be very sufficient commercial reasons, unknown to this Court, for such a relaxation; but it must be done under the immediate eye of the Government. Parties cannot be permitted to take licences for one purpose, and apply them to another; in such a case, it would be going beyond the powers of this Court to extend its protection.

Ship and Cargo condemned..

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(Instance Court.)

THIS was a cause of possession at the suit of *William Tindall*, the former *British* owner, against Mr. *Tavanera* the asserted owner in possession. The ship was formerly *British*, and had been captured by a *French* privateer towards the latter end of the year 1807, and carried to *Pontevedra* in *Spain*, soon after which she was condemned to the captor by a sentence of the Prize Tribunal at *Paris*. At the commencement of hostilities between the *Spaniards* and *French*, the Junta of the province of *Gallicia* passed an act, dated the 11th Sept. 1808, for the sequestration of all *French* property; and on the 10th of *September* following appointed Don *Josepb Calderon* their commissioner for the sale thereof. This ship being considered as *French* property was brought from *Pontevedra* to *Corunna*, and there sold by the commissioner to Mr. *Tavanera*. Upon the approach of the *French* army to *Corunna*, Mr. *Tavanera*, who was a member of the Junta, caused the vessel to be laden with as much of his property and effects, as he could collect, and embarked with his family for *England*, where he soon afterwards arrived. The only papers on board were a copy of the act for the sequestration of *French* property, a paper relating to the appraisement of the ship, and a certificate of the *English* consul, stating that the *Victoria* was obliged, by the situation of affairs, to quit the port without being able to procure the proper documents. The absence of a bill of sale was accounted for by Mr. *Tavanera*,

British ship captured by the *French*, and carried to *Spain* and condemned. — Afterwards seized by the Junta as *French* property and sold. — Title of purchaser good against former *British* owner.

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who stated that it was intended that a formal document of the sale of ship should be made out to him, as soon as the confusion subsided ; but that the subsequent occupation of the place by the *French* prevented this from being done.

*On the part of the former owner it was contended—*That there was no proof of the condemnation by the Prize Tribunal at *Paris* ; that Mr. *Tavanera*, who had an immediate interest in establishing that fact, could only speak to his belief.—That the sentence should be produced, in order to enable the Court to judge of the legality of the condemnation. That the production of that document was also necessary in order to ascertain the date, because if it should turn out that it took place after the dissolution of amity between *France* and *Spain*, they were no longer allies in the war, and in that case the condemnation by the *French* Tribunal at *Paris* would not be legal. That supposing the condemnation to be good, still it should be recollected, that when the Junta of *Gallicia* laid their hands on this ship they were acting as the allies of this country. That it was in the nature of a re-capture, and that Mr. *Calderon* had gone beyond his duty in proceeding to dispose of the vessel. That it could not be considered as the act of the Junta, by whom nothing had been done or could regularly be done to divest the *French* proprietor, if there had been such a condemnation of the property at *Paris* as really to give him that character.

*For Mr. Tavanera it was contended—*That the former owner was completely divested by the sentence of the Prize Court at *Paris* ; that although that sen-

ence could not be produced, there was an affidavit by *Huth*, a clerk in the employ of the *French* captor's agent in *Spain*, who spoke to the fact, and to his having been in possession of the sentence of condemnation. That the order directing the sequestration of *French* property, and the authority given to *Calderon* to sell, was a sufficient act on the part of the Junta to convert the property; as, by the law of *Spain*, a sentence of condemnation was not necessary for that purpose.

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JUDGMENT.

Sir *William Scott*.—This is a question arising on the claim of a former owner of this ship, which was originally *British*, but had been captured by a *French* privateer in 1807, and carried to *Spain*. Under the circumstances in which the ship quitted *Corunna*, the port from which she sailed to come to this country, it is not surprising that there should be a great deal of obscurity respecting her former history. The usual documents and ship-papers were not on board; and there is a certificate of the *English* Vice Consul at *Corunna*, stating, that owing to the situation of the place at the time she sailed, it was impossible to procure them. The account given by Mr. *Tavanera*, the present owner, is this, “that in consequence of intelligence being brought that the *British* troops were retreating, he was apprehensive that the *French* would take possession of *Corunna*, and he therefore purchased this ship of the Junta of *Gallicia*, with a view of quitting the place. That accordingly, on the 17th of *January*, when the *English* Troops embarked, he went on board this vessel with his family, and in a few days arrived at *Weymouth*.” In another part of his

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evidence he states, " that the ship was captured from the *English* by a *French* privateer, called the *General Martin*, and was carried into *Pontevedra* in the latter end of the year 1807, as he believes; and that she was condemned by the Tribunal at *Paris* as being *English* property." I observe too that the sails, and other parts of her equipment, had been warehoused, from which it may fairly be inferred, that the ship had lain for some time in the *Spanish* port, and therefore it may reasonably be presumed that condemnation had taken place. Under such circumstances the Court would have allowed the party the opportunity of making further proof; but there is a very satisfactory affidavit, by a person of the name of *Huth*, who states, " that he was a clerk in the house of *Urbietu* and Co. of *Corunna*, the agents of the *French* privateer *General Martin*, by which this vessel was captured; and that they took the usual and necessary measures in regard to the care and management of the said prize while the captors were proceeding to obtain condemnation thereof in the Prize Tribunal at *Paris*; that the said ship and cargo were accordingly condemned as lawful prize to the *French* captors by sentence of the said tribunal, and the said sentence duly legalized by the *Spanish* Resident at the *French* Court, was remitted to *Urbietu* and Co." And he positively swears, " that he has perused the said sentence, which he had in his own possession, and that he attended with the same at the office of the Tribunal of War at *Corunna*, for the purpose of expediting the sale both of ship and cargo; that in consequence thereof the said ship and cargo were put up for sale, but such sale was afterwards suspended, owing to some disputes with the collector of the customs, and during that period the revolution

volution in Spain took place." The condemnation of this vessel, in the port of an ally by the *French* Tribunal, is perfectly legal, and by that sentence the former *British* owner is divested. He could have no interest in her subsequently, unless she had been recaptured from the *French* by a *British* cruizer, or by an ally, with whom we have treaties expressly stipulating for restitution on salvage. Our law has laid it down, that *British* recaptors are to restore to *British* owners on salvage; and it is possible that some such stipulation may be made with the present Government of Spain, but until that is done, the *British* owner can have no right to claim restitution of the vessel from the person who is legally in possession of her. Our own local regulations are not applicable, as rules of authority to the case of recapture, even by allies in the war, who proceed by different rules, and it is by no means the disposition of this country to force the regulations of its own domestic policy upon other countries. Unless, therefore, it could be shewn that the new treaty, which we have not seen, does provide for such cases, and that it has a retrospective effect, the *British* proprietor has no interest in the question; he is out of Court. It appears that the ship was seized by the Junta of Galicia as *French* property, and was brought round to Corunna, where it was sold to Mr. Tavanera, under their authority. It would be absurd to say that the Junta were not competent for this purpose, when they were possessed of the supreme authority of the country, embracing, of course, the admiralty, and every other jurisdiction which can emanate from the sovereignty of the state. I think the instrument, by which they directed the sequestration and sale of this vessel, is an act sufficiently formal as an Admiralty process on their part,

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even if by the law of *Spain* a formal sentence of condemnation had been necessary to give validity to the transfer.

Ship restored to Mr. *Tavanera*, the *Spanish* Owner.

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THORSHAVEN, and its Dependencies.

Public property withheld under a capitulation and, afterwards seized, is property of the Crown—Operations of Privateers on land limited by Prize Act.

IN this case the King's proctor intervened for the Crown, and prayed to be heard on his petition against the condemnation of certain goods and specie proceeded against as prize to the private ship of war *Salamine*. It appeared that Captain *Baugh* of his Majesty's ship *Clio*, had attacked the castle of *Thorshaven*, in the island of *Stromoe*, on the 16th May 1808, and obtained possession of the place under a capitulation consisting of three articles, by which it was stipulated that the castle and batteries should be given up, that the garrison should not serve against his *Britannic* Majesty during the term of one year, that all private property should be respected, and that all government property should be at the disposal of the captors. Part of the public property was carried on board the *Clio*, and Captain *Baugh* sailed soon afterwards, without leaving any of his own people upon the island, but entrusted the charge of it together with the custody of the remainder of the public property, to the *Danish* municipal officers. About a fortnight after this, *Gilpin*, the commander of the *Salamine*, landed with a part of his crew, with the intention of storming the fort, but upon being informed of the capitulation he re-embarked and put to sea. Having, however, in the course of his cruise obtained intelligence that some merchandize and monies belong-

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ing to the King of *Denmark* had not been delivered up under the capitulation, he returned and took possession of the property in question.

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On behalf of the Crown, The King's Advocate and Arnold contended—That although there was reason to suppose that the property now proceeded against was private property, and so far it would aggravate the wrong if any had been done, yet the main question was, whether there had not been a previous capitulation, by which *all* the property on the island had acquired a new character, or such an appropriation as would protect it from seizure. That as there was nothing to shew that this was public property except the affidavits of the captors themselves, and the court had said that it would not take that fact merely upon their testimony, the discussion of that day must be limited to the articles of capitulation. That under those articles there was a total surrender of all public property ;—that there was an entire extinction of all the former rights of property, which vested in the King of *Denmark*, and a transfer of those rights to the Crown of *Great Britain* ;—that by another part of the articles the private property of the inhabitants was to be protected, and upon the surrender of the island Captain *Baugh* had a right and a power to grant them protection from the arms of the sovereign under whose authority he acted, and in whose name he acceded to the conditions of the treaty. That when Captain *Baugh* went away he did not by any means give back the island, but he felt that it was necessary that some sort of government should be left there, and he entrusted that duty to the *Danish* municipal officers. That they were not restored to the exercise of that authority which they had before, but a new authority was given them, derived from the sovereign

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reign to whose arms they had surrendered ; that from the character acquired by this property and by the island generally, it was no longer open to an attack by his Majesty's arms.

For the Privateer, Adams, and Jenner referred to that part of the act on petition in which it was alledged "that Captain *Baugh*, whilst cruizing off the *Faro* Islands received intelligence that some enemy's vessels were lying in *Thorshaven*, in the island of *Stromoe* ; that the said island being a place of considerable strength as well as of advantage to the enemy, he conceived it to be his duty to capture the said island, if possible," and contended, that as Captain *Baugh* had acted without any authority from his government, the capitulation did not partake of the nature of a treaty, that it could be considered in no other light than merely as a personal agreement between him and the governor of the place, in which Captain *Baugh* stipulated for that which it was alone in his power to grant, namely, a limitation of his own rights as captor. That it was not intended to bind others who were no parties to the agreement ; that by this capitulation government property was to be at the disposal of the captor, and that they had disposed of it by carrying away what they thought proper, by destroying a part and by leaving the remainder behind. That the protection granted in the articles went no further than the persons and property of the garrison ; that the inhabitants were not included, but were left in the condition of persons from whom the hostile character was not taken off. That Captain *Baugh* had not left any *British* force to keep possession of the island, and that the *British* flag was hoisted only while the *Clio* was there. That it was only material to ascertain whether this was publick or private property,

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with a view to repel the insinuations which had been thrown out against the commander of the privateer, who had shewn every disposition to respect the capitulation. That the *Clio* did not intend to return, and could not preserve her rights by an enemy's municipal officer, that the inhabitants still continued *Danish* subjects, as there had been no transfer of the sovereignty nor any stipulation respecting them, and consequently that their property was open to the attack of any other *British* cruizer, though Mr. *Gilpin* had been anxious to avoid giving them any molestation. That this part of the public property reverted to the *Danish* Government; the *Danish* municipal officers naturally remained in possession of all that was not destroyed and could not be carried away by the *Clio*, and therefore, that it was impossible to say that it could in any manner be considered as the property of the Crown of *England*.

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In reply, The King's Advocate and Arnold contended— That the objection that this capitulation was not to be considered as a treaty, because Captain *Baugh* acted without authority and solely with a view to his private interest, was not sustainable. That it could not be denied that officers in his Majesty's service were competent to make treaties upon the surrender of any place to his Majesty's arms though such treaties; have only the form of articles of capitulation until their final ratification. That the object of Captain *Baugh* was a national object; it was to reduce this island in order that his Majesty's government might afterwards take further steps respecting it. That it could not be denied that the interests of the whole island were included in the capitulation, which was made in the names of the two sovereigns. That it was clear from the stipulation respecting private property in the third article, that it extended to all the inhabitants of the island. That
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although there had been no formal transfer of the sovereignty, there was a possession which gives all the rights of sovereignty during the war *jure belli*, and therefore if the court should feel it necessary to decide on so extensive a question, it would consider these persons as actually under the protection of *Great Britain*. That the capitulation was equally effectual for the protection of all property public and private, for it disposed of all; private property it protected, and public property was to be given up, and the privateer therefore could do no more than seize for the Crown. That it was impossible to say that the capitulation was at an end when the *Clia* went away, for if so, she might have returned the next day, and have seized all the private property in the island. That she had dismantled the fort and stripped the *Danes* of their means of defence, which they had surrendered upon the faith of the treaty; and if the treaty was to expire on her departure, any small privateer which could not have attacked the fort itself, taking advantage of the fact of capitulation, might have come upon them in their defenceless state, and made prize of every thing upon the island. That such an interpretation of the capitulation would be productive of the most serious consequences; it would be a breach of national faith towards these persons who had surrendered their own means of defence, under a treaty which was to protect them from the operations of his Majesty's arms.

Court.—I take it that the operations of privateers are confined to the attack of *fortified* places on land.

Counsel.—That is the restriction: by the 9th section of the Prize Act,* privateers are not entitled to capture private property on land; now this had ceased to be a
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* 45 G. 3. c. 72.

fortified place, it was completely dismantled, and it is not in the power of the Lords of the Admiralty to grant a commission that would give the privateer an interest in this property; if it is to be made the subject of condemnation as public property, it must go to the Crown; if it should turn out to be private property our prayer is, that it may be restored until a claim is given by the lawful owners.

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JUDGMENT.

Sir William Scott.—This is a proceeding of a very singular nature, arising from the capture of this *Danish* island by one of his Majesty's ships of war, and a subsequent seizure of certain property found there by a commissioned privateer. The particular circumstances of the transaction are stated in an act on petition. On the part of the Crown, it is alledged, "that *Thomas Baugh* esquire, commander of his Majesty's ship *Clio*, whilst cruising with the said ship off the *Faro* Islands, received intelligence that some enemy's vessels were lying in *Thorshaven*, in the island of *Stromoe*, one of the *Faro* Islands; that the said island being a place of considerable strength, as well as of advantage to the enemy from its situation, the said Captain *Baugh* conceived it a duty incumbent on him to capture the said island, if possible; and accordingly, on the 15th of *May* 1808, having arrived off the island, he anchored the *Clio* within half gun-shot of *Thorshaven* Castle, when the *Danish* governor consented to a surrender of the island. That articles of capitulation were entered into, by which it was provided, that the castle and batteries, together with all the arms, ammunition, and warlike stores, should be delivered up to the *British* force; that the garrison should march out with the honours of war, and engage not to serve in any capacity against his

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Britannic Majesty, during the term of one year ; that all private property should be respected ; and that all Government property should be at the disposal of the captors." The right, therefore, of the privateer to capture and proceed against this property is denied by the crown, on the ground that it was protected under this capitulation ; but it is contended on the part of the privateer, that the capitulation was not a valid proceeding, because it originated wholly in the mind of the commander of the *Clio*, and was not the result of any instructions communicated to him from government. Now there are instances innumerable in which it has been held by this court, that an officer not immediately under the eye of government, may originate such expeditions, *subject to a responsibility* : and that government in the present instance, has approved of what was done, is demonstrated by this circumstance, that the Crown is here standing upon the act of Captain *Baugh*, and claiming an interest under it. It is, therefore, as much an authorized capitulation, as if Captain *Baugh* had gone out under special directions to make the capture. If the Government had disavowed and disclaimed the whole proceeding, and had said, we do not think this remote island a proper object of the public force, there might have been room for the objection ; but looking to what has actually been the conduct of Government, it must be considered as giving its sanction to the whole transaction. The object of Captain *Baugh*, as it is stated in the act, was not merely to reduce the fortress, but to capture the island, and the capitulation which was entered into between him and the governor who had the chief command, was not made in their own names, but in those of their respective sovereigns. Now what is this but a public convention ? it is a treaty bearing the stamp and impress

impres of public authority, between persons acting in the names, and as the representatives of the governments to which they belong. In the first article it is stipulated, "that the castle, with all the arms and ammunition, shall be delivered up:" in other words, that all the means by which the *Danish* government could keep a forcible possession of the island, shall be put into the hands of the *British*. The next is, "that the garrison shall not serve against his Majesty for one year;" and the third article, which is the most pertinent to the present enquiry, provides that "all private property shall be respected." By which I understand, not merely the property of persons belonging to the garrison, but of all the individuals under its protection; for the surrender of the fortress was in fact, and in all reasonable understanding, the surrender of the island, and it was so acted upon. The same article then goes on to say, that "all public property shall be at the disposal of the captors," referring undoubtedly to the public character in which they profess to treat, and not to the assumption of any right to dispose of it on their own private account. It is merely, that it shall pass into the possession of the captors, for the purpose of being brought to adjudication, subject to the legal considerations applying to such property under our own internal regulations. It has been argued much at length upon the effect of such a capitulation, that it does not convey the sovereignty; but though it may not operate to the direct conveyance of the sovereignty, which is usually left to be determined by treaties of peace, it transfers a present possession to the capturing power, subject to the future events of war and treaties; it is part of its present possession, and perhaps part of its ultimate jurisdiction. It appears that when possession of the island was taken, the *British*

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tish colours were hoisted on the castle ; now can there be a more direct assertion of *British* jurisdiction, or a more entire divesting of *Danish* authority than this? It is not clear whether the *English* flag was still flying at the time of the second capture. When Captain *Baugh* quitted the island, which was in a few days after the capture, he did not leave any of his own people to keep possession, but entrusted it, together with some public stores and treasure, to the charge of the *Danish* municipal officers, whom he commissioned to act provisionally ; having accepted that trust, if they removed the *British* flag, it was a breach of duty on their part, which will not deprive the *British* government of the rights acquired by the capitulation. Captain *Baugh* left the island it is true, but how did he leave it? He did not relinquish it on the part of *Great Britain*, but, as is not unusual, deputed the former magistracy to maintain the public tranquillity under a new authority. It is said to be hardly credible, that Captain *Baugh* would have left this treasure behind if it had come to his knowledge, when there could be no difficulty in bringing it off. What may have been his views in suffering it to remain, is not stated, but if it is necessary to suggest a reason founded on public convenience, I think that suggestion might easily be furnished from the obvious policy to be observed in reference to a newly constituted government in a remote and newly acquired possession. The act then states, “ that since the said surrender or capitulation, the said property has been illegally taken possession of by Baron *Hompesch*, and others, concerned in the *Salamine* privateer ; which treasure and other public property, was and is within the true intent and meaning of government property, as specified in the third article of the capitulation, and that if any part of the property taken was pri-

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private property, it is protected from capture and confiscation under the said 3d article." Now what was the condition of this island under the capitulation? I conceive that nothing can be more clear, than that if the capitulation was not disavowed by the *British* government, it was binding upon the respective parties: it was a stipulation operating on the *Danes* to give up all public property, and on the *British* to respect all private property. Suppose that the *English* government, without disavowing the capitulation, had sent a force the next day to take possession of the private property in the island, could there have been a more outrageous breach of public faith? On the other hand, what was the obligation on the part of the *Danes*? they were bound to give up all public property, and if any was kept back, as it is alledged on the part of the privateer that this was, it was kept back in fraud of the *British* government, in whom it already vested by compact, and being fraudulently withheld, it did not become again the property of the *Danes*. By the capitulation the *English* government became legally entitled to the whole of the public property, and this seems to be admitted in the act on petition, for it is there stated, " that the said ship *Salamine* having arrived at *Thorshaven*, the said *Thomas Gilpin*, the captain of the privateer, and part of his crew, immediately landed, in order to storm and take possession of the fort, but found that it had been about a fortnight before partly destroyed by his Majesty's ship *Clio*: that the *Clio* had quitted the said town without having left any part of her crew, after having taken on board such of the public stores and property as were found in the said town and delivered up to the said *Thomas Baugh* as government property under the articles of capitulation, the purport
of

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of which capitulation was communicated to the said *Thomas Gilpin*: that in consequence thereof, and in full persuasion that all public property had been given up to the said *Thomas Baugh*, he the said *Thomas Gilpin*, his officers and crew, the following day reimbarcked, and went to sea." The act then goes on to state, that "having been afterwards informed that certain goods and monies belonging to the King of *Denmark* had been kept back, the said *Thomas Gilpin* returned and took possession of the property in question." Here then is a distinct admission that the capitulation operated, and was intended to operate upon the whole of the public property; but say they, some of the public property was not delivered up! Whether it was fraudulently withheld, or whether it was left there for the purposes of government, or the convenience of the captor, does not appear; but supposing that it was surreptitiously detained, what was the duty of the privateer? Certainly upon making the discovery, the only proper course was to take possession of the property as salvor for the Crown, and to notify the circumstance. To say, that in this short period of time, the capitulation and all its consequences were gone by, while the inhabitants claimed protection under it, and while this qualified possession of the island still continued, is contrary to all reason. If private individuals had at that period a right to shelter their property under the capitulation, the *British* government had also a title to all public property under the same capitulation. It is clear, that if the property was fraudulently withheld, it ought to have been taken possession of for the Crown of *Great Britain*, and the private captors ought not to have attempted to appropriate it to themselves by setting up a title of their own. It is hardly necessary for me to enter into the other topics

topics which have been thrown out in the argument ; but as they have been touched upon, I will just state my opinion, upon one point, which is, that the commissions of privateers do not extend to the capture of private property upon land ; that is a right which is not granted even to the King's ships. The words of the third section of the prize act extend only to the capture by any of his Majesty's ships " of any fortrefs upon the land, or any arms, ammunition, stores of war, goods, merchandize, and treasure belonging to the state, or to any public trading company of the enemies of the crown of *Great Britain* upon the land." Here then the interests of the King's cruizers are expressly limited, with respect to the property in which the captors can acquire any interest of their own, the state still reserving to itself all private property, in order that no temptation might be held out for unauthorized expeditions against the subjects of the Enemy on land. With regard to private ships of war, the Lords of the Admiralty are empowered by the 9th section, to issue letters of marque to the commanders of any such ships or vessels—for what purpose? Why " for the attacking and taking any place or fortrefs upon the land, or any ship or vessel, arms, ammunition, stores of war, goods, or merchandize, belonging to, or possessed by any of his Majesty's enemies,"—where? " in any sea, creek, river, or haven." I perfectly well recollect that it was the intention of those who brought this bill into Parliament, that privateers should not be allowed to make depredations upon the coasts of the enemy for the purpose of plundering individuals, for which reason they were restricted to fortified places and fortresses, and to property water-borne ; and, therefore, although I am not sufficiently informed as to the precise nature

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of this property, yet taking it to be private property, and not within the reach of the capitulation, it is that in which the privateer has acquired no legal interest under her commission. I cannot dismiss this subject, without at the same time observing upon the conduct of the persons concerned in this privateer, in terms of some disapprobation. When they found this public property, which under the capitulation enured to the benefit of the Crown of *Great Britain*, it was their duty to have given notice to the Crown Officers of the fraud which had been practised, limiting their own expectations to the interest which they would derive as salvors for the Crown. The only witness brought forward to speak to the circumstances of the capture, and the nature of the property is *Baron Hompesch*, a releasing witness, who was rated on board this privateer as *Chaplain*; no one person has been produced who from his own knowledge can speak to the nature of the property. Upon any supposition, I am of opinion that the privateer has no interest, and I shall therefore condemn the public property to the Crown conformably to the terms of the capitulation, and reserve the consideration of the private property till it is claimed.

PENSAMENTO FELIZ, MEGALHAENS.

July 11th,
1809.

THIS was a *Portuguese* ship, with a cargo belonging to *British* and *Portuguese* merchants, which had put into the port of *Muros* in *Spain*, in consequence of having sustained damage on her voyage from *Pernambuco* to *Liverpool*. The vessel was brought out by the boats of the *Endymion* frigate, at which time there were only four persons on board. The ship and cargo were restored; but it appearing that a considerable benefit had been rendered to the parties interested in the property by this interference of the captors, a question arose as to the *nature* of the salvage to which they were entitled.

Salvage given for bringing off a vessel from a *Spanish* port within the power though not in the actual occupation of the *French*.

JUDGMENT.

Sir *William Scott*.—The question principally agitated here has been, whether the rescuing of this ship and cargo is a service of that description, which will entitle the party to salvage under the Act of Parliament. No one can deny that the property has been rescued from considerable peril by Captain *Capel*, and that he is entitled to a remuneration of some kind or other; but it is contended that the service rendered was not of a military kind, and that therefore it is a matter not cognizable in the Prize Court. Now supposing it were clear that there really was no salvage as of war, the effect of this objection would only be, that I should put the parties to the expence of a new proceeding in the Instance Court, by transferring this case from one jurisdiction to the other. There is no doubt that the Court of Admiralty has a general jurisdiction to reward services of this nature, and

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and that the party would recover by action in the Instance Court; but then the proceeding there would be attended with fresh expences. As the question, therefore, has arisen incidentally here, the Court would be disposed to lay hold of any circumstances that might give this service the character of a war salvage, and to press them with more effect than it might otherwise do, for the purpose of bringing the case within the jurisdiction, which has been already exercised upon it; and taking all the circumstances together, I think there is enough to justify the Court in so doing. This ship was in the port of *Muros* when the *French* took possession of the place; it is true they had retired to proceed on another expedition, but they were not driven away, their hand was still in effect upon the town, and they had it in their power to return whenever they thought proper. The principal persons of the place were in the *French* interest, and entirely disposed to second any attack upon *British* or *Portuguese* property, and it is highly improbable that they would willingly have suffered this ship and cargo, which they knew to be destined for *England*, to come away without molestation. The *French* too were near at hand, and not unlikely to return; and under such circumstances, and to protect the parties from further expence, I think I am not guilty of any violent straining of the principle in pronouncing this a military service, and consequently, that the parties under the act are entitled to a salvage of one eighth.

FANNY AND ELMIRA, Hicks, Master.

July 21st,
1809.

THIS was an *American* vessel, which had been sold in *Ireland* by the master, without the authority of his owners. He stated in an affidavit which was given in, "that in consequence of damage which the vessel had sustained by getting upon the rocks in *Sligo* bay, he deemed it right to call a survey, which was accordingly made by competent persons, who reported that it would require 1,500l. to repair the vessel, a sum far exceeding her value, and that it would be for the interest of the concerned to have her sold. That in consequence of this advice the ship was advertised for sale, when Mr. *P. Ormsby* of *Louisville* in *Kentucky*, then at *Sligo*, became the purchaser for the sum of 305 l. That he accordingly executed a bill of sale for the ship to Mr. *Ormsby*, who by his desire paid 167 l. 3s. 9d. into the hands of Messrs. *Hume* of *Sligo*, the correspondents of his owners, and the remainder was carried to account between him and *Ormsby*. That *Ormsby* soon after made an offer to sell him a quarter part of the said vessel at the price which he had himself given for her, provided the deponent would consent to navigate her again as master, and to which he acceded. That after the vessel was repaired she proceeded on a voyage to *Riga*, from whence she was returning to the port of *London*, when she was captured by the *Danes*, and recaptured by the *Hound* sloop of war."

American ship
restored on sal-
vage to former
owner, but with-
out prejudice to
the rights of a
party claiming
under an alleged
purchase from
the master in
Ireland

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JUDGMENT.

Sir *William Scott*.—This is the case of a vessel which is at present in the possession of the Court, having been recaptured from the enemy, and brought to this country. The ship is clearly *American* property, whoever may be the owners, and the only question is, to whom it shall be restored. A claim has been given in by a Mr. *Ormsby*, an *American*, who represents himself as having purchased the vessel at a public sale at *Sligo*, in *Ireland*; and there is also a claim on behalf of Messrs. *Coit* and *Edwards*, of *New York*, who are admitted to be the original owners, and whose names appear as such in the register and other ship-papers. A sale of the vessel was made in *Ireland*, by the master, without the authority of his owners; and it is contended that such a sale, being made under the pressure of necessity, will convey a valid title to Mr. *Ormsby*, the purchaser. But, in the first place, it must be shewn that there was a necessity, and then it remains to be considered whether it was such as by law would give the master a right to sell. That such a case may arise, I am not prepared to deny; suppose, for instance, a ship, in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair. Under these circumstances, what is to be done? the ship may rot before the master can hear from his owners; and, therefore, if the necessity were clearly shewn, with full proof that every thing was done *optima fide*, and for the real benefit of the owners, the Court might be disposed to sustain a purchase so made. There is a very convenient practice which obtains in the Courts of Vice Admiralty in the *West Indies*, where the

the fact of distress being proved, the transaction is not left to the master, but a sale is ordered under the superintendence of the Court itself. The legal validity of such transfers has, however, been contested in the Courts of this country, and they were not held to be good; though the learned Lord, who presided in the Court where that decision took place, might perhaps incline to consider it as a defect in the law of this country, that a practice so conducive to the public utility could not legally be maintained. In a case of that description, I say, strongly put, where there was no ground for suspicion, although I do not know that such a power is given to the master by the general maritime law, yet, feeling its expediency, this Court would strain hard to support the title of the purchaser. But then there must be the clearest proof of the necessity; it must be shewn not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose. Now in this case, all that is said in the bill of sale is, that the ship had suffered so extremely in the harbour of *Sligo*, that upon a survey of her situation and state, she was condemned, and a sale for the benefit of the concerned recommended. Mr. *Ormsby* states that, since the purchase, he has been under the necessity of laying out upwards of 800*l.* upon the vessel to put her in repair; but then, if it was worth his while to do all this, how does it appear that it was not equally fit to be done for the original owners? There is no constat that the master could not obtain money for the repair of the vessel; on the contrary, the correspondents of the owners, at *Sligo*, declare, that they did every thing in their power to prevent the sale, and were ready to make any advances that might be found necessary.

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and
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But the Court is not called upon to determine upon the validity of the title, which may be matter of discussion hereafter in the *American* Courts; It is only required to give possession—and undoubtedly, I shall not take upon myself to do any thing which might have the appearance of affirming this purchase, which has been conducted in a manner that throws a great degree of suspicion upon the whole transaction. The fact that the master afterwards became a subordinate purchaser, under *Ormsby*, of one fourth part of the vessel, and at the price which he himself had given for her, smells rank of collusion. It is also a very extraordinary circumstance, that the master, who executed the bill of sale annexed to the claim of Mr. *Ormsby*, in which he represents himself as having full authority to dispose of this ship, says, in his answer to the tenth interrogatory, that “the ship was sold for the benefit of the underwriters, and therefore no bill of sale was made.” The ship’s register, and all the papers, point to *Coit* and *Edwards* as the owners of the vessel, and I have no hesitation in restoring the possession to them. But it is said, that Mr. *Ormsby* does not object to the restitution of the ship to the former owners, provided he is indemnified for the money which he had laid out; and the case has been assimilated to some others, in which a neutral, having purchased under a title which was not allowed, the Court has given the expences of amelioration. But those were *bona fide* purchases, under a title which the neutral thought to be good, and which afterwards was disallowed, upon a principle of law, which was latent to him. Here I do not say there was actual collusion between the parties; but there is that which would, in some degree, warrant the suspicion.

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picion. How any man, of common prudence, could have become a fair and disinterested purchaser, under such a bill of sale, and where there were such reasons to doubt the regularity of the master's conduct, is not very intelligible; but if Mr. *Ormsby* has so done, he must look to the seller for his remedy. I certainly shall not refer it to the registrar and merchants to report upon the money asserted to have been laid out by Mr. *Ormsby*, in the amelioration of the vessel, as owner under this purchase; besides, the proposition is subject to this further inconvenience, that, supposing him to be disposed to relinquish his claim to the vessel, the master may dissent, and prevent his retiring under such an arrangement. I, therefore, restore the possession of the vessel to the persons appearing by the register and ship's papers to be the owners, without prejudice to such rights as Mr. *Ormsby*, or any other persons, may have acquired by purchase, or otherwise as shall appear to the proper Court of Justice in *America*.

July 18th,
1809.

LUCY, TAYLOR.

*Sale of Prize
Vessel by the
Enemy not
within the
restrictions of
the order in
Council
as Nov. 1807.*

THIS was the case of an *American* ship which had been seized by the *French* at *Hamburg*, on account of her having come from *England*. The ship was condemned by the Prize Tribunal at *Paris*, soon after which she was purchased at a public sale for her former owners; and the question was as to the validity of the purchase under the Order in Council, which declares the sale of ships by the enemy to neutrals to be illegal.

JUDGMENT.

Sir *William Scott*.—I am of opinion, upon the whole, that the parties are, in this case, entitled to restitution. It is a proceeding under the Order in Council, prohibiting, on a principle of retaliation, the sale of ships by the enemy, on a supposition that they had declared all sales of *English* vessels to neutrals to be null and void. It is certainly a restriction which is contrary to the general policy of this country, but it was thought necessary to counteract and repel the injurious effects of the rule adopted by the enemy. When the cause came on before, I was inclined to hold that whatever hardships might arise to neutrals, it was a just application of the principle of retaliation, and as such the consequence should be laid at the door of the enemy. At the same time it did appear to me to be extremely necessary not to carry the rule one inch beyond the purpose for which it was adopted; and that if it could be shewn that the enemy did not follow up their or-

financès to their full extent, the policy of this country would suggest a corresponding relaxation. In this case the ship had been seized at *Hamburg* by the *French*, on the ground of coming from this country, and was sold under a sentence of condemnation, when she was repurchased by her former owners. The Court felt the hardship of preventing neutrals from purchasing their own vessels, and therefore suspended its decree to see what was the exact nature of the restriction imposed by the enemy. On looking into the *French* Code de Prizes, I have reason to think that it was not a part of *French* policy to restrict the sale of enemy's prize vessels; for though it is laid down in general terms in the ordinances of 1744 and 1778, that ships constructed by the enemy, or such as have belonged to an enemy proprietor, cannot be considered as the property of neutrals or of allies, unless it shall be shewn that the transfer took place before the commencement of hostilities; yet there is an arrêt of the 16th *Jan.* 1780 *, from which it appears that *French* ships taken and sold as prize by the enemy

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* Par l'article 7 de mon règlement du 26 Juillet 1778, concernant la navigation des sujets des puissances neutres, j'ai ordonné la confiscation des bâtimens qui auroient appartenu à mes ennemis, à moins qu'il ne fût justifié par pièces authentiques qu'ils ont été achetés avant les hostilités : La ferme résolution ou je suis de donner toute protection à la liberté du commerce, m'ayant déterminé à excepter à cette disposition les bâtimens de mes sujets qui auroient été pris et vendus par mes ennemis : je vous fais cette lettre, pour vous dire que mon intention est, que les vaisseaux François, achetés par les neutres depuis le commencement des hostilités, ne puissent être réputés de bonne prise quoiqu'ils aient appartenu à mes ennemis.—Lettre du Roi 'A.M. L'AMIRAL, Code des Prizes, tom. 2. p. 829.

are

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1809.

are not to be considered as within the terms of these rigorous orders. Now this is a case precisely of that description; the ship was taken by the *French*, and repurchased by the former owner; and as I think it would be improper to carry the restriction further than the enemy has done, unless the captor can shew that a more rigid rule has been applied by the modern Government of *France*, I shall restore, giving them their expences. *

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1809.

Breach of
blockade.—
Claim of joint
interest on the
part of the fleet,
admitted, the
capture being
within the pur-
poses of the as-
sociated service.

FORSIGNEID, WILLESEN.

IN this case an allegation had been given in on behalf of the fleet under the orders of Admiral *Dickson*, setting forth a claim of joint capture. The allegation stated, "that Admiral *Dickson* having received orders to proceed with the Squadron under his command, for the purpose of forming the blockade of the *Texel*; he judged it necessary, for the better execution of the service, that a closer blockade should be effected with the view of intercepting any vessels that might, from their small draught of water, be able to keep close in shore, and thereby evade the vigilance of his Squadron. That by a certain order in writing under his hand, he directed Captain *Smith* of His Majesty's ship *America*, with some other vessels, to cruize between the *Hakcsand* and *Camperdown*, taking care strictly to watch the motions of the enemy, and to join him occasionally for the purpose of communicating intelligence of any movements made by them. That Captain *Smith* was at the same time expressly ordered

* The captor was unable to shew that any other rule had been applied by the present *French* Government, and consequently the restitution passed under this decree.

red carefully to avoid being at such a distance as to
 ent his observing signals made from the fleet. That
 : short time afterwards, Admiral *Dickson*, by an
 r in writing of the same tenor, directed Captain
 b of His Majesty's ship *Director*, to take the station
 ie *America*, and perform the services above men-
 ed with the then detached ships. That in conse-
 nce of the aforesaid orders, His Majesty's ships
 ector, *Veteran*, and *Latona*, with the *Hazard* Cutter,
 e, in the morning of the fourth day of *May* 1799,
 the mouth of the *Texel*, and between the rest of the
 t and the shore, and were acting in concert and co-
 rating with the rest of the squadron under Admi-
Dickson. That from day-light till half past five
 lock in the said morning, they were in sight of the
 t at the distance of about five or six miles, and
 iding in on different tacks towards the enemy's
 re, but were soon after lost sight of, until about a
 urter past nine o'clock, by reason of an intervening
 iness. That between the said hours of half past
 e and nine the said detached ships met with and
 ained the *Forfigheid*, and four other ships, for which
 fleet had been watching some days. That at the
 e of capture the fleet were not at a greater distance
 n ten or twelve miles from the in-shore squadron,
 l were sufficiently near to have heard the report of
 guns, had any resistance been made, and to have
 mediately joined in battle. That if at the time of
 ture the fleet was not in sight, it was caused by the
 rvening haziness of the weather, as the detached
 s could not have been in any situation between
 fleet and the shore, without at the same time being
 sight, if the weather had been clear. That between
 e and ten the detached ships again appeared in
 fight

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 FORSIGHEID.

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*The
Forsignier.*

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fight with the vessels they had brought to, and at eleven joined the rest of the squadron."

JUDGMENT.

Lords, 18 July,
1809.

Sir William Scott.—This case has been depending a great length of time, in order to receive the benefit of the judgment of the Superior Court in the case of the *Nordstern*, which has lately been decided. In that case the prize was not taken for a breach of the blockade of *Cadiz*, from which port she was coming out at the time, the fleet not being stationed there for the purpose of preventing the egress of *merchant* vessels, but to watch the enemy's fleet, which was then in a state of preparation for sea. The case therefore resolved itself into a mere question of property not involving any question of breach of blockade, and it was held that the rest of the fleet were not entitled to share in the proceeds of the cargo which was so condemned, as the capture was not within the purposes for which they were associated; from which it should seem to follow, that ships captured for a breach of blockade would be the joint prize of the whole fleet employed on that service. On admitting the allegation in this case, I laid it down as a principle, that there was in the nature of such an association a unity and identity of service, that formed a just foundation for joint interest in prizes taken for the violation of blockade, because it could not be supported without unity of operation. The association formed the blockade, which could not exist without it. It remains, therefore, for me to consider whether the evidence is such as to bring the case within the principle; and I am of opinion that it does. It appears that this prize was captured by certain vessels belonging to the fleet of *Admiral Dickson*, which he had sent close in shore for the

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purpose of executing the duty of the blockade in more effectual manner, with express orders to avoid going at such a distance as to be out of sight of his flag. From day-light till half past five o'clock on the morning of the capture, they were in sight of the fleet, were soon afterwards obscured by an intervening thickness of the weather, and were not seen again till about a quarter past nine, having in the interval made the capture in question. It is admitted in the answers, that these ships were associated in the same service of blockade, and that in the execution of that service some were stationed close in shore, and others at a distance, further out, and that this prize was taken not only during the association of the squadron for this purpose, but for a breach of the blockade; and therefore, upon the principle which I laid down upon the discussion of the allegation, I am bound to pronounce that the whole fleet must be entitled as joint captors. Admiral *Dickson*, who gave the orders, appears to think that the capturing ships were detached from the rest of the squadron; but they were not so in the legal sense of the word, which implies not merely a local separation, but that the ships are sent off upon some other service. Here all the ships of the fleet were acting together for the same purpose, and consequently are equally entitled.

The
FORGIVENESS.

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1809.

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1809.

JONGE JOSIAS, JURGENSEN.

Danish ship
seized in the
Tagus by Ad-
miral *Berkley*;
claim by Master
for his share in
the vessel as
protected under
the 16th article
of the conven-
tion of *Cintra*,
not admitted.

Aug. 30, 1808.

THIS was a *Danish* ship, which with several others had been seized by Admiral *Berkley* in the *Tagus* on the 24th of *Feb.* 1809, and sent to *England* for adjudication. In the first instance a claim of territory had been advanced by the *Portuguese* Consul, but that was withdrawn, and the question now arose upon a claim which had been given in on behalf of the master for three eighth parts of the ship, his property, as protected under the 16th article of the Convention of *Cintra*. The article provides "that all subjects of *France*, or of powers in friendship or alliance with *France*, domiciliated in *Portugal*, or accidentally in the country, shall be protected; their property, of every kind, moveable and immoveable, shall be respected; and they shall be at liberty either to accompany the *French* army or to remain in *Portugal*. In either case their property is guaranteed to them, with the liberty of retaining or of disposing of it, and of passing the produce of the sale thereof into *France*, or any other country where they may fix their residence, the space of one year being allowed them for that purpose. It is fully understood, that shipping is excepted from this arrangement, only however in so far as regards leaving the port, and that none of the stipulations above mentioned can be made the pretext of any commercial speculation." It was stated in the claim, that the ship entered the port of *Lisbon* some time in *August* 1807, prior to the declaration of hostilities on the part of *England* against *Denmark*, and also prior to the occupation of *Lisbon*.

y the *French*, and that she remained there unmolested until she was seized by Admiral *Berkley*.

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JONAS JOSIAS.

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On behalf of the Claimants—A letter from Admiral *Cotton*, who commanded off the *Tagus* in August 1808, was relied on to shew that he had not acted against these vessels after, or in consequence of the Convention of Cintra; and it was contended generally, that as these *Danish Masters* were the subjects of a power in amity with *France*, and accidentally in the country, they came fairly within the simple construction of the treaty, and were entitled to protection under it so long as they remained in port. That the only exception with respect to shipping related to their quitting the port, and that it was clear, from the exception itself, that property of that description was within the intent and meaning of the contracting parties.

For the Captors—It was urged that the proviso as to shipping must be taken with reference to the context, and could have this meaning only; that if any persons included in the preceding part of the article happened to be possessed of any property in shipping, the protection should also extend to that description of their property. That the article evidently referred to such persons as were adherents to the *French* cause in *Portugal*, and not to persons going there on other grounds and with other views. That the permission to dispose of the property, and to pass the proceeds into *France*, or any other country where they might fix their residence, shewed that the article was not intended to apply to this description of persons. That it was an interpretation sufficiently large to admit that it extended to all persons holding connection with the

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French during the time they were in possession of the country, and could not be extended to cases not in the contemplation of the contracting parties, nor within the sound interpretation of the words employed in the instrument which they had constructed.

JUDGMENT.

Sir *William Scott*.—I am called upon to decide this question, and every consideration of public policy and of tenderness for the parties interested, makes it proper for me not to delay giving the opinion of the Court upon the legality of the claim, which has been submitted to its consideration. In the first instance, a claim was given by the *Portuguese* Government for these vessels, as having been taken in violation of the territorial rights of that nation. But it has been withdrawn, and consequently there is an end of any protection which these *Danes* can derive from a pretension so introduced, it being an established law that the claim of territorial right can be advanced only by those to whom the territory belongs; the subjects of other states can do no more than refer themselves for redress to the neutral power under whose rights they hoped to find protection. The parties, however, have set up a claim under the stipulations of the Convention of *Cintra*, which, it is assumed are applicable to the property of these *Danish* Masters of vessels. Now I think there is a question preliminary even to this, namely—whether the stipulations of a treaty can be set up by those who were not parties to it. The *French*, who were parties to the treaty, might undoubtedly, though they are enemies, contend for that construction which they might alledge was in the intent and meaning of the contracting parties at the time, and they have a right

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right to demand the application of the treaty so construed, to those persons on whom they meant to confer protection. But whether others who have no rights as parties to that treaty, but who are indirectly benefited by it, are competent to contend for its fulfilment is, I think, more than doubtful. Taking it, however, that these *Danish* masters are competent to claim under the treaty, the question then is, whether the construction here contended for, is that which the Court would be warranted in adopting. For although the Court might be disposed to put a favourable interpretation upon the articles of the treaty, it is bound to construe them according to their natural and fair meaning, and not to impose upon the contracting parties stipulations, which were never in their contemplation. The business of the Court is to expound and explain, not to frame original treaties. Now it is a feature of the Convention of *Cintra*, very illustrative of its real character, that it is a treaty for the military evacuation of *Portugal* by the *French* army, and that the parties to it are the commanders of the respective armies. That is a circumstance which impresses a strong conviction that this treaty has no direct reference to maritime interests, and ought not to receive such an application, unless it is distinctly expressed. If there are any articles pointing to the immunity of these vessels, the Court would be inclined to give them full effect, and not to construe them with a punctilious hesitation and scrupulosity, respecting the competence of the authority under which they were framed. But in general, the fact that it was drawn up by military persons, and for great military purposes, does give the treaty a character which is useful as expository of its true meaning. The maritime department was sepa-

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rate and distinct, and under a distinct authority ; unless, therefore, there are articles that do expressly point to maritime objects, it is reasonable to conclude that they were not in the contemplation of the parties themselves. Taking that as a fair rule of exposition, I am to consider the effect of the 16th article of the treaty, as applied to the claims of the masters of these *Danish* vessels, which were lying in the *Tagus* at the time ; and it would certainly be a singular circumstance if the *French* Generals had stipulated for the protection of the property of these persons who happened to be upon the spot, amounting only to a small part of the vessels, without making any provision for the remaining parts of those vessels, which were equally the property of the allies of *France*, though not personally in *Portugal* at that time. The words of the article are these, “ that the property of persons domiciliated, or accidentally in the country, shall be protected ;” and under this description it is said, that these persons are to be considered as being accidentally in the country, and that therefore they come within the provisions of this article. The words are certainly large, but I must again refer to what I before observed, that this is a treaty applicable to military affairs, to the exclusion of every object of maritime policy. Under the terms “ domiciliated,” these *Danish* masters certainly do not come ; do they then under the other description of persons “ accidentally in the country ?” If these words stood alone, with the strong disposition I feel to give them the most favourable construction, I should, though not perhaps without doing some violence to their meaning, be inclined to hold that these persons, being on board their ships in the port of *Lisbon*, might be included under the terms “ accidentally in the country.” I should under that disposition be inclined to hold, that the

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word "accidentally" applied to all persons in a situation contra-distinguished from domiciliated, though perhaps more immediately to persons attending on the armies, or on visits, or residing there for the purposes of business, pleasure, or curiosity. It would require, however, all the indulgence, which I admit the personal circumstances of the case call for, to include under the description, masters of ships coming merely to the port, and not to the country. But when I look to the context, I think it results in the clearest manner, that the words never were intended to convey such a meaning; for how does the article go on? "That they shall be at liberty to remain in *Portugal*, or to accompany the *French* army." That is the alternative: now what kind of option is this, what prospect does the permission to accompany the *French* army, or to remain in *Portugal*, hold out to these *Danish* masters? They could only remain by giving up their vessels and their employment; and as to following the *French* army, it is quite ridiculous, when applied to persons so circumstanced. The article then goes on in the same strain, "that they shall be protected, and may be at liberty to transfer themselves to *France*, or any other country, in which they may wish to fix a residence." Now these are persons who have a fixed residence already in their own country, they have no wish to remove to *France*, which is entirely out of all contemplation with them or to any other country but their own; they have no intention of disposing of their shares in these vessels, still less of remaining in *Portugal*. Neither the one nor the other of these alternatives can, without a ludicrous perversion of the terms, be applied to these persons, or to the property of masters of vessels, who come to the port only to go back again, and it is evident that they were wholly out of the view of the contracting

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tracting parties. Then follow the words “ shipping is included ” in this article, which has very justly been described as clouded in some of that obscurity which hangs over no small portion of this treaty. But I do not understand those words as enlarging the description of persons meant to be benefited. The interpretation which I put upon the words is this, there are a great number of foreign merchants residing at *Lisbon*, many of whom are possessed of shipping, and the ships of such persons who are themselves protected by the preceding part of the article to which these words must refer, are to be protected also ; it being stipulated that if they send the ships out to sea, they shall not carry off their property without being under the view of those who have a right to guard against any abuse of the indulgence. Under these considerations, and not without considerable pain, I feel myself bound to construe the treaty in a manner unfavourable to the claimants, and to hold that it does not extend to the protection of their property in these vessels, which I am satisfied was not within the view of the persons who framed the convention. There are circumstances in the case which entitle this unfortunate class of men to the utmost indulgence from those who may be ultimately benefited ; but at present it is my public duty to pronounce that their property in these vessels are not protected under the treaty.

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JUDGMENT.

SIR William Scott.—This is an appeal from a sentence pronounced by the Judge of the Vice Admiralty Court at *Halifax*, condemning this ship and cargo for an alledged breach of the Navigation Laws. A libel was given in on behalf of the seizor ; reciting in the first article the 7 & 8 W. III. ch. 22. sec. 2. by which it is provided, “ that after the 20th day of *March*, “ in the year of our Lord 1698, no goods or mer- “ chandizes whatsoever shall be imported into, or “ exported out of, any colony or plantation in *Asia*, “ *Africa*, or *America*, belonging to His Majesty, or in “ his possession, or which may hereafter belong unto “ or be in the possession of His Majesty, his Heirs or “ Successors, or shall be laden in or carried from any “ one port or place in the said colonies or plantations, “ to any other port or place in the same, in any other “ ship or bottom, but what is or shall be of the built of “ *England*, or of the built of *Ireland*, or the said colo- “ nies or plantations, and wholly owned by the people “ thereof, or any of them, and navigated with the “ masters and three-fourths of the mariners of the “ said places only, under the pain of forfeiture of “ ship and goods ;” and again, “ that all ships coming “ into or going out of any of His Majesty’s plantations “ and lading or unlading any goods or commodities, “ therein, shall be liable to the same rules, visitations, “ and forfeitures, as ships are liable to in this kingdom “ by 13 & 14 Car. II. c. 11.” and also “ that when any “ question shall arise respecting the importation or

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“ exportation of goods into or out of the said plantations, the proof shall lie upon the owner, and the claimer shall be reputed the importer or owner.” The libel then refers to the regulation contained in the 7 Geo. III. ch. 9. “ that the master of every ship or vessel coming into or going out of any *British* colony or plantation, whether such ship or vessel shall be laden or in ballast or otherwise, shall publicly, in the open Custom House, to the best of his knowledge, answer upon oath to such questions as shall be demanded of him by the Collector and Comptroller, or other principal officer of the Customs, for such port or places, concerning such ship or vessel, and the destination of her voyage, and concerning the goods and merchandize that shall or may be laden on board, and shall come directly to the Custom House before he proceeds with his vessel to the place of unlading, and make a just and true entry upon oath of the burthen, contents, and lading of such ship or vessel, with the particular marks, numbers, qualities, and contents of every parcel of goods therein laden, to the best of his knowledge; also where and in what port she took in her lading, of what country built, how manned, who was her master during the voyage, and who are the owners thereof.” The 8th Geo. III. ch. 22. is next referred to, which provides, “ that all forfeitures and penalties relating to the trade or revenues of the *British* colonies or plantations in *America*, may be sued for and recovered in any Court of Vice Admiralty which shall have jurisdiction within the plantation where the cause of such prosecution or suit shall have arisen.” Then follows the 26 Geo. III. ch. 60. generally denominated the Register Act, by which it is provided that, “ in case of any alteration of the property
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“ in any ship or vessel registered as a *British* ship, there
“ shall be endorsed on the certificate of the Registry
“ before two witnesses, the town, place, parish, or
“ factory, where all and every person or persons, to
“ whom the property in any ship or vessel, or any
“ part thereof, shall be transferred, shall reside or be
“ a member of ; and the person to whom the property
“ in such ship or vessel shall be transferred, shall deliver
“ a copy of such endorsement to the person or persons
“ authorized to make registry of ships.” “ That
“ no registry of *British* ships or vessels shall be made
“ in any port or place other than the port or place to
“ which such ship or vessel shall properly belong, and
“ every registry and certificate granted in any port
“ or place to which such ship or vessel does not pro-
“ perly belong, shall be utterly null and void ; and
“ the port to which any ship or vessel shall be deemed
“ and taken to belong, is declared to be the port from
“ and to which such ships or vessels shall usually trade,
“ and at or near which the managing owner or owners
“ usually resides or reside, and no ship or vessel shall
“ be in anywise entitled to the privileges of a *British*
“ ship, unless the owner or owners shall have obtained
“ a certificate of the registry of such ship or vessel, in
“ the form described in the said last mentioned sta-
“ tute.” “ That when and so often as the master or
“ other person having or taking the charge or com-
“ mand of any ship or vessel registered in manner here-
“ in-before directed, shall be changed, the master or
“ owner of such ship or vessel shall deliver to the
“ person or persons herein-before authorized to make
“ such registry, at the port where such change shall
“ take place, the certificate of registry belonging to
“ such ship or vessel, who shall thereupon indorse and
“ subscribe a memorandum of such change, and shall
“ forth-

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“ forthwith give notice of the same to the proper officer
 “ of the port or place where such ship or vessel was
 “ last registered pursuant to said statute, who shall
 “ likewise make a memorandum of the same in the
 “ book of registers;” and also, “ that from and after
 “ the 1st day of *August* 1786, no ship or vessel shall be
 “ deemed or taken to be *British* built, or enjoy the
 “ privileges thereunto belonging, which shall from
 “ thenceforth be rebuilt or repaired in any foreign port
 “ or place, if such repairs shall exceed the sum of fif-
 “ teen shillings for every ton of the said ship or vessel,
 “ according to the admeasurement thereof, unless
 “ such repairs shall be necessary, by reason of extra-
 “ ordinary damage sustained by such ship or vessel.”
 The next statute recited is, the 28 Geo. III. ch. 6.
 where it is said, “ that no goods or commodities what-
 “ ever shall be imported from any of the territories
 “ belonging to the United States of *America*, into the
 “ province of *Nova Scotia*, under the penalty of the
 “ forfeiture thereof, together with the ship or vessel
 “ importing the same, with all her guns, furniture,
 “ ammunition, tackel, and apparel;” and it concludes
 with this general provision, “ that every forfeiture shall
 “ be recovered in such courts and by such ways, and
 “ the produce thereof applied in such manner, and to
 “ such uses, as any forfeiture respecting the customs
 “ may now be sued for, either in this kingdom, or in
 “ any of His Majesty’s dominions in *North America*,
 “ or the *West Indies*.” Then follows the statute 34
 Geo. III. ch. 68. sec. 22. which provides, “ that after
 “ the expiration of six months from the conclusion of
 “ the war, to be notified in the manner in the said act
 “ specified, no ship or vessel, which is or shall be
 “ registered, or which is by law required to be regis-
 “ tered as a *British* ship or vessel in any of the ports of
 “ *Great*

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“ *Great Britain, Guernsey, Jersey, the Isle of Man*
 “ or any of the colonies, plantations, or territories
 “ belonging, or which may hereafter belong to His
 “ Majesty, shall be navigated but by a master and
 “ three-fourths, at least, of the mariners *British* sub-
 “ jects; and also, that if any goods, wares, or mer-
 “ chandize, shall be imported or brought, exported
 “ or carried coastwise, contrary to the provisions of
 “ this act, or any of them; or if any ship or vessel
 “ shall sail in ballast, or shall fail to be employed in
 “ fishing, or being required to be manned or navi-
 “ gated with a master and certain proportion of *British*
 “ mariners, shall not be manned and navigated
 “ according to the provisions of this act, such ship or
 “ vessel, with her guns, furniture, ammunition, tackle,
 “ and apparel, and all the goods, wares, and mer-
 “ chandize, on board the same, shall be forfeited.”

And, further “ that from and after the 1st day of *March*
 “ 1795, when any transfer of property shall be made
 “ in any *British* ship or vessel, while she is upon the
 “ sea, on a voyage to a foreign port or ports, the
 “ master, if privy to such transfer, shall proceed di-
 “ rectly to the port for which the cargo on board is
 “ destined, and shall proceed from such port to the
 “ port of His Majesty’s dominions to which she belongs,
 “ or in which she may be legally registered, and such
 “ ship may take on board, in the port for which her
 “ original cargo was destined, or any in other port being
 “ in the course of her voyage to the port where she
 “ may be registered *de novo*, such cargo, and no
 “ other as shall be destined, and may be legally
 “ carried to the port in His Majesty’s dominions to
 “ which she belongs, or in which she may be legally
 “ registered *de novo*; on failure whereof such
 “ ship or vessel shall, to all intents and purposes, be
 “ from thenceforth considered and deemed, and taken

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“ to be a foreign ship or vessel, and shall not be again
 “ registered and be entitled to the privileges of a
 “ *British* ship.” And it is also provided, “ that every
 “ forfeiture incurred by said act may be sued for,
 “ prosecuted, and recovered in the same way that any
 “ forfeiture, incurred by any law respecting the Reve-
 “ nue of Customs may now be sued for, prosecuted,
 “ and recovered.” These are the statutes relied on
 in the libel by the seizer, and the alledged grounds of
 seizure are, “ that this ship imported a cargo of to-
 “ bacco, and other articles, into *Halifax*, from *Bal-*
 “ *timore*, or some other port or place in the United
 “ States, under pretence that the ship was proceeding
 “ on a voyage from *Baltimore* to the Island of *Antigua*
 “ in the *West Indies*, but was obliged to put into the
 “ port of *Halifax* in distress, when, in point of fact,
 “ the said schooner was not obliged to put into the
 “ said port. That *Charles Hall*, the claimant, who
 “ describes himself as a *British* subject and merchant,
 “ belonging to *Paramaribo*, in the *British* colony of
 “ *Surinam*, was not a *British* subject residing at *Pa-*
 “ *ramaribo*, nor was he the master or owner of the
 “ vessel; that the vessel was not qualified, according
 “ to law, to trade to or from a *British* colony, with
 “ all the privileges of a *British* ship; and that *Hall*,
 “ when he reported his vessel, refused to answer,
 “ upon oath, such questions as the Collector and
 “ Comptroller of the Customs were bound to de-
 “ mand of him concerning the vessel and the goods
 “ laden on board. That neither *Hall*, nor any other
 “ person, as the master of the schooner, from the
 “ time of her arrival, on the 18th of *June*, until the
 “ seizure thereof, on the 22d of *June* following, made
 “ any entry or report on oath concerning the said ves-
 “ sel and her cargo. That *Hall* did not appear, by
 “ the

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“ the certificate of the registry of the schooner, to be
 “ either the master or owner, neither did it appear,
 “ by indorsement or otherwise, who the true owners
 “ or master were; that by the certificate of the re-
 “ gistry, which was granted at the Custom House at
 “ *Halifax*, May 21st 1806, it appeared that *Henry*
 “ *Taylor*, of *Halifax*, was the sole owner, and that
 “ *James Elmslie* was the master. That the said *Henry*
 “ *Taylor* and *James Elmslie*, in the month of *May*
 “ preceding the seizure, required the original registry
 “ of the vessel to be cancelled at the Custom House
 “ in *Halifax*, the said *Henry Taylor* being no longer
 “ owner of the said vessel; that, to obtain the dis-
 “ charge of the said *Henry Taylor*’s bond, upon which
 “ the registry was made, the said *James Elmslie* did
 “ deliver in a copy of a bill of sale, certified by
 “ *William Wood* Esq. His Majesty’s Vice Consul for
 “ the State of *Maryland*, whereby it appeared that
 “ the said schooner *Eleanor* had been sold at *Baltimore*,
 “ in the United States of *America*, for the sum of
 “ £.600. sterling, to *Charles Hall*, then of *Baltimore*,
 “ since which time the schooner *Eleanor* was no longer
 “ considered as a *British* vessel, on the registry of the
 “ port of *Halifax*, but was a *British* vessel sold in a
 “ foreign port. That, nevertheless, the said *Charles*
 “ *Hall* was trading from a foreign port to a *British*
 “ colony with the said vessel, and navigating her as a
 “ *British* ship, in the name of her former *British*
 “ owner and master, thereby concealing the true
 “ ownership of the said vessel. That the said vessel,
 “ at the time of seizure, was not pursuing a direct
 “ course as a *British* ship should do, to the port to
 “ which she belonged, or to any other port in which
 “ she might be registered *de novo* as a *British* ship.
 “ That the cargo laden on board was not destined to
 “ such port, nor could it legally be carried on board
 “ the

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“ the said vessel to any port in His Majesty’s dominions,
 “ in which the said vessel could be legally registered.
 “ That the said vessel was engaged in trading from a
 “ foreign port to a *British* colony, as a *British* built
 “ vessel, entitled to all the privileges thereto belonging,
 “ when, in fact, she was not entitled to the privileges
 “ of a *British* ship, she having received repairs in a
 “ foreign port, exceeding, in value, the sum of fif-
 “ teen shillings for every ton which the said schooner
 “ admeasures, which repairs were so given and made
 “ to the said schooner, without her having sustained
 “ any extraordinary damage, which made such re-
 “ pairs necessary. That the cargo, being the growth
 “ manufacture, and produce of some foreign country
 “ were imported on board the said schooner into the
 “ port of *Halifax*, from *Baltimore*, or some other
 “ port or place in the United States, the said schoone
 “ not being a *British* ship, and navigated according to
 “ law. That the conclusion of the war in which His
 “ Majesty was engaged in the year 1794, having been
 “ duly notified in the *London Gazette* by order of
 “ His Majesty, more than six months last past, yet
 “ the said schooner, at the time of the seizure thereof,
 “ was trading to a *British* colony, from a foreign
 “ country, as a *British* ship, duly registered and enti-
 “ tled to the privileges of a *British* built-ship, when
 “ in fact she was not navigated by a master, and
 “ three-fourths, at least, of her mariners *British* sub-
 “ jects.” A claim was given by Mr. *Hall* for the ship
 and cargo, in which he states “ that the schooner was
 “ engaged in a voyage from *Baltimore* to the island of
 “ *Antigua*, and put into the port of *Halifax* in dis-
 “ tress, solely for the purpose of repair, and to pro-
 “ cure a supply of water for the crew, and not for
 “ any purposes of trade. That he is a *British* subject,
 “ and

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“ and resides and carries on trade as a *British* merchant
“ at *Paramaribo*, in *Surinam*. That in the month
“ of *January* last past, the schooner *Eleanor* was lying
“ in the port of *Paramaribo*, when this respondent
“ made an agreement with the master for the purchase
“ of her for the sum £. 600 sterling. That the re-
“ spondent loaded the schooner on his own account,
“ and proceeded in her (the said *James Elmslie* still
“ continuing master) to *Baltimore*, in the United
“ States. and on his arrival there he waited on the
“ *British* Vice Consul, and informed him of the
“ agreement for the sale of the said schooner, and
“ asked his advice as to perfecting the transfer; that
“ the Vice Consul informed them that he thought
“ the certificate of registry could not be indorsed
“ there, as there was no *British* Collector of the Cus-
“ toms at that port, but advised the respondent to
“ take a bill of sale there, and that he would grant a
“ certificate of the transfer from one *British* subject to
“ another, which might be attached to the copy of
“ the bill of sale, and that there would be no difficulty
“ in procuring an endorsement at the first *British* port
“ to which the vessel should proceed. That respon-
“ dent followed the said advice, and procured a bill
“ of sale from the said *James Elmslie*, and obtained
“ the said Vice Consul's certificate of the sale and
“ transfer, and also his certificate that he was the
“ master of the vessel in the room of the said *James*
“ *Elmslie*, the Vice Consul being of opinion that the
“ endorsement could not be made on the certificate
“ of registry in a foreign port. That on the voyage
“ made by the said schooner to *Baltimore*, in the
“ months of *February* and *March* last, she experienced
“ very violent gales of Wind, which shattered and
“ strained the vessel, very much injured her sails and
“ rigging,

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“ rigging, and rendered the boat quite useless ; that
 “ the respondent was therefore obliged to expend a
 “ considerable sum of money in *Baltimore* to repair
 “ the said vessel, and render her sea-worthy in her
 “ hulls, sails, and rigging, and to purchase a boat,
 “ the whole of which expence was caused by extraor-
 “ dinary damage received in the storms the vessel had
 “ met with on her voyage to *Baltimore*. That at
 “ *Baltimore* he loaded the ship with the present cargo,
 “ and cleared the said ship and cargo for the island of
 “ *Antigua*, and procured insurances thereon for his
 “ own account at *Baltimore*, for the voyage from that
 “ port direct to *Antigua*. That in consequence of
 “ the desertions of several of the crew of the said
 “ schooner, he was obliged to hire five seamen at *Balti-*
 “ *more*, two of whom were *British*, and the other
 “ three *Americans*, no more *British* seamen being to
 “ be had at that port ; that he sailed with the schooner,
 “ laden as aforesaid, on the 15th day of May last, he
 “ crew then consisting of eight persons, including him-
 “ self as master, five of whom were *British* subjects.
 “ That they proceeded towards *Antigua* as direct-
 “ as the winds would permit, but the wind being al-
 “ most continually to the southward and south-west,
 “ and often blowing violent gales, they were kept from
 “ their due course, and on the 4th of June they had
 “ proceeded no farther south than to latitude 32 de-
 “ grees ; that the wind still continuing to blow from
 “ the south, and appearing to be fixed in that quarter,
 “ their jibb being shattered, the rigging a good deal in-
 “ jured, and their stock of water being reduced to 140
 “ gallons, and being in the longitude of *Halifax*, the
 “ respondent consulted with the first and second mate,
 “ and resolved to bear away for *Halifax* to repair and
 “ pro-

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“ procure a supply a water, and also to take advantage
 “ of a convoy, if any should offer, for the *West Indies*.
 “ That they accordingly bore away for *Halifax*, and
 “ arrived in this port early in the morning of the 18th
 “ of *June* last; that having met the Collector of the
 “ Customs in the street, before the opening of the
 “ Custom House, the respondent informed him of his
 “ arrival in distress, and afterwards, on the same day,
 “ he reported his vessel and cargo at the Custom
 “ House, and stated that his destination was to *Antigua*,
 “ whither he should proceed as soon as his sails were
 “ repaired and his water-casks filled, and that he had
 “ no intention to land any part of his cargo in this pro-
 “ vince. That he, at the same time, delivered into
 “ the Custom House the certificate of the vessel’s re-
 “ gistry, and the clearance from *Baltimore* to *Antigua*.
 “ That having filled his water-casks, and completed
 “ the repair of the sails and rigging, he, this respon-
 “ dent, on the 20th of *June*, applied at the Custom
 “ House for his papers, that he might proceed on his
 “ voyage to *Antigua*, but was surprised by a refusal of
 “ the Collector to deliver them up, and who subse-
 “ quently informed him that he meant to detain the
 “ schooner. That the respondent, by advice of
 “ Counsel, applied at the Custom House on the 23d
 “ of *June* for the certificate of Registry, for the pur-
 “ pose of making a new bill of sale, and perfecting the
 “ transfer from Mr. *Taylor* to the respondent, and on
 “ the same day he completed the bill of sale, and en-
 “ dored the same on the certificate, and returned it
 “ to the Custom House the following day, together
 “ with a manifest of the cargo of the schooner. That
 “ the schooner was purchased by him for his own ac-
 “ count; that he applied to the *British* Vice Consul

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“ at *Baltimore*, for the purpose of making the transfer
 “ in due form of law, and that he intended to apply
 “ for a register *de novo* of the schooner at *Antigua*,
 “ in consequence of the information of the said Consul
 “ and his own belief that a register could be legally
 “ granted there. That the voyage was *bonâ fide* from
 “ *Baltimore* to *Antigua*, and that he should have gone
 “ directly thither had he not been prevented by adverse
 “ winds and boisterous weather, and the want of
 “ repairs and water. That he was never requested
 “ by the Collector of the Customs to make oath as to
 “ his destination or cargo ; and that he did not im-
 “ port the same into the said port of *Halifax* within
 “ the true intent and meaning of the acts of Parlia-
 “ ment.” To this answer there is a replication by
 the seizer, in which he charges “ that as Collector of
 “ His Majesty’s Customs when any *British* ship owned
 “ and registered in the port of *Halifax*, shall cease to
 “ belong to the person in whose name it was originally
 “ registered, he is bound by law to compel the parties
 “ to cancel the registry thereof, and to prevent such
 “ vessel from trading any longer with the privileges
 “ of a *British* built ship, until it is registered *de*
 “ *novo* ;” he then goes on to charge “ that *Hall* refused
 “ to report his vessel according to law, and to answer
 “ any question upon oath concerning his destination
 “ and cargo. That *Hall* has not such a residence in
 “ or near *Paramaribo* in *Surinam*, as would have en-
 “ titled him as a *British* subject to have registered the
 “ schooner at *Paramaribo*. That the schooner after
 “ being purchased by *Hall* at *Paramaribo*, ought to
 “ have been registered by him *de novo*, if he had a
 “ place of residence at or near the said port ;” he then
 denies the necessity of the repairs done at *Baltimore*,
 and

and avers “ that the schooner was not driven into the
 “ port of *Halifax* in distress ; and that if the ship had
 “ arrived at *Antigua* she could not have been there re-
 “ gistered as a *British* ship, and that the schooner was
 “ engaged in a trade which it was not lawful for her
 “ to pursue.”

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The seizer then admits “ that he did not detain the
 “ schooner for some days, as he was unwilling to do
 “ so, until he had tried every means in his power to
 “ induce the said *Charles Hall* to make a true report
 “ on oath respecting the ship and cargo, and the
 “ destination.”

The cause came on before the Judge in the Court
 below, who condemned the ship and cargo, and di-
 rected the proceeds to be distributed according to the
 statute ; an appeal was made to this Court, and the
 seizer stands before the Court to defend the sentence,
 the Crown having waved its interest. But nothing is
 to be inferred from this act of the Crown, so as in any
 degree to affect the real and equitable merits of the
 case, when it comes to be judicially considered ; because
 it is notorious that the Crown is in the habit of prac-
 tising great liberality, and if it errs at all it ought to err
 on that side in cases of this nature. Any presumption
 which might be thought to arise from such a circum-
 stance, is at least balanced by the ordinary presumptions
 in favour of a sentence already obtained in a Court
 of Justice.

The statutes upon which the proceedings in this case
 are founded, compose in a great degree the Navigation
 Law of this country. Their utility has been univer-
 sally felt and acknowledged, and Courts of Justice
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in the sentences they have given, have shewn a disposition to support them with great exactness. I will not say that the Court would not step in for the protection of persons erring innocently, and in point of immaterial form only; but it is not to be said that many of the provisions of these statutes are mere forms, though formal in their own requisitions; the forms they enjoin to be observed are necessary for the protection of the principles of law intended to be maintained; they are in this case the substantial securities of the rights of the country in matters of navigation, and it is therefore the duty of all Courts to see that these forms are properly observed. I will just notice some of the general provisions of one or two of these statutes, before I enter further into the consideration of the case itself. By 26 Geo. 3. c. 60. s. 8. “no
“ subject of His Majesty, his heirs and successors,
“ *whose usual residence is in any country not under the*
“ *dominion of His Majesty, his heirs and successors,* shall
“ be deemed or entitled during the time he shall so
“ continue to reside, to be the owner in whole or in
“ part of *any British* ship or vessel, required and au-
“ thorized to be registered by virtue of this act, un-
“ less he be a member of some *British* factory, or
“ agent or partner in any house or co-partnership
“ actually carrying on trade in *Great Britain* or *Ire-*
“ *land.*” No person, therefore, is entitled to the exclusive benefit, who has not his usual residence in *Great Britain* or in the dominions belonging to the Crown; if he goes to another country, and there has a more usual residence than in this, he is no longer entitled to the same privilege. A person who is continually shifting his residence, so as not to have what under any extension can be deemed an usual residence
here,

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here, does not come within this description of the statute. He must be, unless in the cases which are specified, usually resident in this country; and the same statute not only requires that the *owner* shall be usually resident in this country, but that the *ship* shall be of the manufacture of *British* artificers, and that all repairs shall be done in *British* ports, except to a very limited extent, and under very peculiar circumstances. Another object of the statute is, that there shall be a clear constat of the real ownership, and therefore if any transfer of the property takes place, it must be declared, and the transfer indorsed on the register. The three great provisions of this act are therefore, first, that the party should have such a residence in the *British* dominions, as would entitle him to a *British* Register; he must not be a person coming occasionally, and for the purpose of obtaining a colourable qualification. Secondly, that the ship shall be not only constructed but repaired in the *British* dominions; and, thirdly, that upon any change of the property taking place, it shall be made to appear who is the present owner. The first qualification therefore is, that it shall be shewn that the party has such a residence in the *British* dominions as would entitle him to a register. This is one of the fundamental facts of the case, and accordingly we find that it is put directly in issue between the parties in the pleas which have been given in on both sides. On the part of the seizor it is asserted that, “the said *Charles Hall* is not a *British* born subject, “entitled to trade with the privileges of a *British* merchant, and owner of a *British* ship; for that the said “*Charles Hall* hath no fixed domicile, or place of “abode, in any part of the *British* dominions, but is “an itinerant merchant sojourning in different parts

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“ of the United States.” On the other hand it is stated in the claim, “ that *Hall* is a *British* born subject, “ and that he resides and carries on trade as a *British* “ merchant at *Paramaribo* in *Surinam*, where two per- “ sons are now employed by him to conduct his busi- “ nefs during his absence.” Now as the burthen of proof is thrown upon the claimant by the statute, what is the evidence furnished by Mr. *Hall* upon this point? The first person examined is *Elmslie*, who sold him the vessel at *Paramaribo*; all that he states is, “ that he “ has known *Hall* only from the time he saw him in “ *Surinam*, (that is from the time of sale,) he is a mer- “ chant, deponent *believes* his fixed place of abode is “ *Surinam*; he is a single man, and deponent does not “ know of his being connected as a partner in any house “ of trade whatever.” All therefore that this person knows of him is limited to the short period of his own residence at *Surinam*, and he knows nothing of his antecedent history. There is another witness of the name of *Black*, who says that “ he has known *Hall* since *November* or *December*, 1805; (this witness being examined in 1807) he *understood* that he re- “ sided at *Surinam*, and has reason to believe him to “ be a *British* subject from his having had transactions “ in *Canada*, and being recommended by their corre- “ spondents *Lester* and *Mcnaugh*, merchants in *Quebec*, “ and from his communications with him, he has no “ doubt in his own mind that he is a *British* subject.” *Davis* the mate says, “ that he has known *Hall* since “ the 21st day of last *November*; that he then lived “ in *Surinam*, he *considered* that place to be his home, “ it is the first place he knew him in; deponent be- “ lieves him to be a *British* subject.” The next wit- ness is *Calcb Smith*, who says, “ that he has known “ *Charles*

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“ *Charles Hall* from the day he shipped under his com-
 “ mand in *Baltimore*, which he states to have been
 “ on the 13th of *May*; that he has *heard* that he re-
 “ sides at *Surinam*, and deponent believes him to be
 “ a *British* subject.” This man’s knowledge goes a
 very little way towards establishing the fact. The last
 witness is *Watts*, who “ entered on board the vessel
 “ at *Baltimore* on the 1st of *May*, since which time
 “ he says he has known *Hall*; he does not know his
 “ place of residence, but has heard and believes him
 “ to be a *British* subject.” This is the whole substance
 of the evidence which is furnished by Mr. *Hall* to shew
 that he had a fixed residence at *Paramaribo*, no part
 of which carries the account of this residence further
 back than to the short date of the time of purchasing
 this vessel. How long he had been at *Paramaribo* or
 in what manner settled, or whether there accidentally
 or occasionally, none of these witnesses profess to have
 any knowledge. It is true, that there might be a diffi-
 culty in finding persons at *Halifax* who could explain
 more particularly what the nature of his residence at
Surinam was, though from what *Elmslie* says in his
 deposition, “ that *Hall* being disgusted with the officers
 “ of the Customs at *Surinam*, said to him that he
 “ would let the vessel stand as the property of Mr.
 “ *Taylor*, and trust to his honour to ratify the bargain,
 “ as he would not take any advantage of him,” it
 looks as if there had been a previous acquaintance
 with Mr. *Taylor*; and as he was upon the spot, he
 might have been examined in support of the state-
 ment. The facts of the case, connected with the his-
 tory of the transfer of the vessel, are these; the ship
 was purchased at *Surinam* by *Hall*, who entered into a
 written agreement with *Elmslie*, the master, for the

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sale of the vessel for 600l., the payment to be made **in** sugars, which *Elmslie* actually received and sent **to** *London*, on account of his owner *Taylor*. *Hall* states in his claim, "that having entered into this agree-
"ment, he loaded the schooner on his own account,
"and proceeded in her (the said *James Elmslie* still
"continuing master) to *Baltimore*." I find this a little difficult to reconcile in point of fact with what **is** stated by *Davis* the mate, who says, "that *Hall* loaded
"the ship, and sent her under the command of *Elms-*
"lie, with a consignment to a Mr. *Thompson* in *Balti-*
"more, and that *Hall* himself arrived at that port **in**
"another vessel." *Hall's* account therefore cannot **be** true, if what is sworn by *Davis*, the mate, is worthy of credit. The ship gets, however, to *Baltimore*, and we find Mr. *Hall* soon after at *Norfolk* in *Virginia*. It is to be observed also, that the crew were shipped **at** *Baltimore* according to *Davis*, who says that "there
"were articles signed by all hands for a voyage fro **m**
"trance to *Antigua*, and back again to any port in *Ame-*
"rica." Nothing, therefore, can be less satisfactory than this evidence, as tending in any manner **to** shew Mr. *Hall's* connection with *Surinam*. Immediately on the purchase he goes away to *Baltimore*, he is found at *Norfolk*, and he is to proceed according to his own account to *Antigua*, without an intention, as far as appears, of returning to *Surinam*, but to some port in *America*: and this fact becomes the more material, as it bears upon another circumstance to which I am going to advert, namely, the transfer of this vessel at *Paramaribo*. As soon as the transfer was made, it was the duty of Mr. *Hall* to have the vessel registered at that place, where, according to his own account, he has a fixed place of abode. This is one of the great objects of the statute, because

at

place where the party is resident, it can be most certainly ascertained whether he is entitled to a register. — To say that a register might be as well obtained at a distant port, would be to enervate and set at naught the obvious provisions of the legislature for the registration of vessels; for how are persons at the Custom House at *Antigua* to know whether the residence of a party at *Surinam* is true or not? It should, from any peculiar circumstances, be required that that duty is not complied with, there is a case which becomes indispensable, namely, that the party should account in a satisfactory manner for the residence. Now I have looked into the claim of Mr. Taylor throughout for some explanation upon this point, but a subject on which he observes a total silence, and does not seem to feel the necessity of accounting in any manner. Different solutions have, however, been attempted; there is one by *Elmslie*, who states that Mr. *Hall* was disgusted with the Custom officers at *Paramaribo*, and therefore determined that the vessel should stand as the property of her former owner, *Taylor*, till he got to *America*. What! is a party at liberty to say, that because he does not like the officers who are appointed to administer the law, he is at liberty to violate it, and to carry his ship away without a passport, not merely to another port, but to a port of another country? This is an excuse which cannot be re-allowed, and the gentlemen in argument have not been necessary to desert it. Another suggestion is, that the persons at the Custom House at *Surinam* should not be acquainted with the necessary forms of the *British* law. But when every body knows what the extent of commercial business is at *Surinam*, and nearly what the number is of *British* proprietors, how

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how can we suppose that proper persons are not appointed to the functions of the Custom-house? These solutions, therefore, entirely fail, but there is another connected with 'the policy of the statutes, tending to clear up the mystery, which is, that probably Mr. *Hall* was conscious that his claim to the character of a *British* merchant could not be received at the Custom-house at *Surinam* where he was known. In this solution one sees indeed a very sufficient reason why he should make his application any where but at that port, and why he had recourse to a foreign port.—It is said, however, that the purchase was not made in *Surinam*, but in *America*. Now that is not very consistent with the averment in the claim that *Hall purchased the vessel at Paramaribo*, and it is clear that he had paid for the vessel there in sugars. Whether there was a formal bill of sale does not directly appear, as the instrument passed at *Surinam* has not been exhibited; yet I cannot but think that there was, when I look at the evidence of *Davis* the mate, for what is the manner in which he speaks of it? He says that “ he does know of
“ orders and instructions being given by Mr. *Taylor*,
“ the former owner, to *Elmslie*, for the sale of the
“ vessel in the voyage on which he sailed from *Hali-*
“ *fax*, as he saw and read them in *Surinam* harbour,
“ and that the ship was accordingly sold at *Surinam*
“ on the 25th of *November* last, and he saw a written
“ agreement or deed of sale between *Elmslie* and *Hall*,
“ the purport of which was, that *Elmslie* sold the
“ vessel for 600l. to be paid in sugars, and which were
“ actually delivered to *Elmslie*, and Mr. *Hall* there
“ took possession of the vessel, but continued *Elmslie* in the
“ command; that he has looked at the paper writing
“ marked *A*, now shewn to him; he cannot undertake

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“ to swear positively that it is a true copy of the origi-
 “ nal bill of sale of the vessel, as it appears more full
 “ and particular, but he is clear and positive *that*
 “ *it is the same in substance and meaning in every*
 “ *respect ;*” *Elmslie’s* account considerably tends to
 confirm this statement: he says, “ that *Mr. Taylor*
 “ gave him written instructions to dispose of the
 “ vessel in *Surinam*, and in consequence of the said
 “ instructions he sold the vessel to *Mr. Hall*; the bar-
 “ gain was made in *Surinam*; the terms of the bargain
 “ were, that he sold the said vessel to *Hall*, on condi-
 “ tion that he was to pay 600*l.* sterling for her in
 “ sugars, which sugars said *Hall* actually delivered, and
 “ he remitted them to *London* on account of *Mr. Taylor*.
 “ There was a bill of sale of the vessel which deponent
 “ signed and executed before the *British* Consul at *Balti-*
 “ *more*, of which he believes the paper marked A. to be
 “ a true copy; that he managed the concerns of the
 “ vessel until the time he sold her to *Mr. Hall* in *Suri-*
 “ *nam*, and from that time until he quitted her at
 “ *Baltimore*, he acted as ship’s husband, or master,
 “ and *Mr. Hall* was the owner, and deponent followed
 “ *his directions and orders* with regard to her concerns,
 “ as long as he remained in her.” In his answer to
 the second interrogatory he also says, “ that the agree-
 “ ment, specifying the bargain, was in writing;
 “ *Mr. Hall* had one copy of it, and the deponent the
 “ other. That *Mr. Hall* had a right to do what he
 “ pleased with the vessel after paying for her, and that
 “ *Taylor* was bound to ratify the bargain if neces-
 “ sary; that *Mr. Hall* became the fair owner from
 “ the day he paid for her in *Surinam*, and deponent
 “ is clear whatever profits the vessel may have made
 “ since the time *Mr. Hall* bought her, must be his.”

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Why then here was a complete transfer, a complete possession and delivery and yet Mr. *Hall* would not comply with the regulations of the statute by getting a register at the place where he was known, but fails to *America* to get a certificate of the transfer from the *British* Vice-Consul. I say that this fact can leave little doubt that Mr. *Hall* is a person not so domiciled as to be entitled to a *British* register at *Paramaribo* upon any evidence which it was in his power to produce; and that he was himself conscious that if he had made his application at the Custom-house at that place it must have been rejected. It is not consistent with Mr. *Hall*'s own description of himself as a *British* merchant and ship-owner, to suppose that he was so entirely unacquainted with the laws of the country to which he lays claim, as not to know that the registry was to be made at the port to which the ship belongs, and therefore if he has not complied with the provisions of the statute, it is not too much to presume that it was for reasons which he has not thought proper to assign. Here, indeed, every thing necessary to constitute a transfer was actually done. But supposing the agreement to have been merely prospective, is it not clear that it was put into that form for the very purpose of evading the statute, and to furnish a colourable ground for the transactions in *America*? Mr. *Hall*, however, goes to *Baltimore* in *this* vessel as *he* swears, but as the mate swears in another vessel; and it is worthy of remark that, according to the evidence of this same person *Davis*, the mate, the ship is consigned, not to himself, but to a Mr. *Thompson*, at *Baltimore*, who upon her arrival there furnishes the necessary stores and repairs, as *owner and ship's husband*.
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When the ship gets to *Baltimore* the next provision of the act is set at nought, which limits the repairs permitted to be done in a foreign port to 15s. per ton. It is said that the repairs were inconsiderable, but that is contradicted by *Hall* himself, who states that “he was obliged to expend a considerable sum at *Baltimore* to repair the vessel, in order to render her sea worthy.” *Elmslie* says, that, “at the time of his leaving *Baltimore* the vessel was hauled into a place to get repairs which she much wanted, and *Davis* says he supposes the repairs would not altogether exceed the sum of 15cl.” Now this is a vessel of only 70 tons, so that here is a considerable excess of the sum allowed by the statute, and the consequence is, that the ship must be considered as an alien ship. Any excess in the amount of the repairs is a matter which the statute watches with the utmost anxiety; it prescribes a very long process of enquiry in the foreign port to be executed in a particular manner, and regularly certified; and if these regulations were not observed, the obvious practice would be to purchase ships and carry them to foreign countries, where they might be repaired at a cheaper rate, to the disadvantage of the manufacturers and shipwrights of this country, whom it is one principal object of the statute to protect. Not one of these requisites obtain the least attention on the part of Mr. *Hall*. He repairs his vessel to any extent he thinks fit, without the least regard to the modes prescribed by the statute. Great credit seems to be taken by *Hall* on account of his application to the *British* Vice-Consul at *Baltimore*; he says that “on his arrival there the respondent and the said *James Elmslie* waited on the *British* Vice-Consul, and informed him of the agreement for the sale of
“ the

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“ the schooner, and asked his advice as to perfecting
 “ the sale and conveyancing thereof; that the said
 “ Vice-Consul informed them that he thought the
 “ certificate of registry could not be endorsed at *Bat-*
 “ *timore*, there being no *British* Collector of the Cus-
 “ toms at that port, but advised the respondent to
 “ take a bill of sale there, and that he would grant a
 “ certificate of the transfer from one *British* subject
 “ to another, which might be attached to the copy
 “ of the bill of sale, and that there would be no diffi-
 “ culty to get the register indorsed at the first *British*
 “ port to which the vessel should proceed.” Now it
 does not appear that the Vice-Consul was made ac-
 quainted with all the preliminary steps of this trans-
 action, because I think it quite impossible if he had
 been told that Mr. *Hall* was a settler at *Paramaribo*,
 and that the sale had been transacted there, that he
 would have given this advice. He would have said, do
 you get back to *Paramaribo* as fast as you can : you
 have not complied with the requisitions of the statute.
 But supposing the Vice-Consul to be unacquainted with
 the law, and to have given this advice ignorantly; would
 that have the effect of justifying Mr. *Hall*? Who is a
British Vice-Consul in foreign port? He is usually a
 merchant of the country in which he resides; and is
 a *British* ship owner, who is bound to know the law
 under which he purchases in his own country, to
 apply to a Consul in another country for the exposi-
 tion of that law, with which he ought himself to be
 acquainted? I say, supposing he had given this ad-
 vice, which is scarcely credible if all the circumstances
 of the transaction had been stated to him, it would in
 no degree have sanctioned the conduct of Mr. *Hall*.
 I must observe that I do not accede to the remark
 which

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which was made in the argument, that this is matter of mere pecuniary penalty, because, by the express directions of the statute, the ship under such irregularities is to be considered as an alien ship unprotected by a *British* register. Now these facts become extremely important, as they go to develop the real nature of this transaction; if you find a man complying with the regulations of his country in the first commencement, it leads to a very natural presumption that the same fair and honourable conduct has accompanied the transaction throughout, and that if he has erred in any subsequent part he has erred from honest ignorance and inadvertency. But if the fact be that in the very outset he has departed from the obligations imposed on him by the laws of his country, it goes far towards determining the interpretation which is to be put upon his conduct, as it appears in other parts of the transaction; in such a case the rule of *qualis ab incepto* is not unreasonably applied. I come now to consider that which is the actual though by no means the only ground upon which this sentence is *directly* to be sustained, and which has been softly described by the Counsel for the claimant as a matter of great imprudence, I mean the entrance of the vessel into the port of *Halifax*. It has been said, that even upon the supposition that this is to be taken as an alien ship, yet whatever may have been the imprudencies of conduct on the part of the owner, she would be entitled to the rights of hospitality if driven into a *British* port in distress; and certainly if the distress were real, whether *Hall* is a *British* subject or not, and whatever may be the character attaching to the ship, she would be entitled to that benefit. Real and irresistible distress must be at all times a sufficient passport for human

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beings under any such application of human laws. But if a party is a false mendicant, if he brings into a port a ship or cargo under a pretence which does not exist, the holding out of such a false cause nixes him with a fraudulent purpose. If he did not come in for the *only* purpose which the law tolerates, he has really come in for one which it prohibits, that of carrying on an interdicted commerce in whole or in part. It is, I presume, an universal rule that the mere act of coming into port, though without breaking bulk, is *prima facie* evidence of an importation. At the same time this presumption may be rebutted; but it lies on the party to assign the other cause, and if the cause assigned turns out to be false, the first presumption necessarily takes place, and the fraudulent importation is fastened down upon him. The Court put the question to the Counsel whether it was meant to be argued that the bringing a cargo into an interdicted port, under a false pretence, was not a fraudulent importation, and it has not been denied that it is so to be considered. Then there is another excuse which has not indeed been pressed upon the consideration of the Court, yet it has been glanced at, which is that the vessel did not come actually into the port, but only into the anchorage stream. But this very description shews that it is a place where vessels coming to the port cast anchor; and it has been decided over and over again, that in order to constitute an importation it is not necessary that vessels should come to a wharf. Besides, Mr. Hall alledges in his claim “that he arrived in the
“port of *Halifax* on 18th *June* last, and having met
“the Collector of the Customs, he informed him of
“his having arrived in distress, and on the same day
“he reported his vessel and cargo at the Custom-
“house.”

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“house.” Upon the fact of importation, therefore, there can be no doubt; and consequently the great point to which the case is reduced, is the distress which is alledged to have occasioned it. Now it must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act, where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: Such a case, though there might be no existing storm, would be viewed with tenderness; but there must be at least a moral necessity. Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and therefore it is liable to be rigidly examined. Having premised these rules and observations, let us see how the case stands upon the shewing of Mr. Hall. He says “that he sailed in the schooner from *Baltimore*, on the 15th day of May last; that they proceeded towards *Antigua* as directedly

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“ rectly as the winds would permit, but the wind being
 “ almost continually to the southward and southwest,
 “ and often blowing violent gales, they were kept
 “ from their due course, and on the 4th day of
 “ June they had proceeded no further south than
 “ latitude 32 degrees ; that the wind still continuing
 “ to blow from the south, and appearing to be fixed
 “ in that quarter, their jib being shattered, the rigging
 “ a good deal injured, and their stock of water be-
 “ ing reduced to 140 gallons, and being in the longi-
 “ tude of *Halifax*, he consulted with the first and second
 “ mate, and resolved to bear away for *Halifax* to repair
 “ and procure a supply water, and also to take advan-
 “ tage of a convoy, if any should offer, for the *West*
 “ *Indies*.” In the first place, in the very setting off, there
 is not that *bona fides* which might have been expected ;
 he says that the voyage began on the 15th of *May*, the
 fact being, that *Hall* himself did not come on board
 until the 20th. *Watts* says, that “ she had been mak-
 ing the best of her way for *Antigua*, according a=
 wind and weather would permit, from the time the=
 left the Capes of *Virginia*, (which it appears was on th=
 21st,) until they bore away for *Halifax* ;” he do=
 not say from the time she left *Baltimore*, and it is cle=
 that she had merely dropped down into the *Chesapeake* =
 and that Mr. *Hall* was in the mean time up at *Norfo*=
 transacting business, for so the log-book exactly e=
 presses. The first entry is dated the 20th of *May* 180 7.
 It says, “ these 24 hours begin with light breeze =
 “ from the N. W. and clear weather, middle a and
 “ latter part of ditto ; at three P. M. Mr. *Hall* returne=
 “ on board from *Norfolk*, weighed anchor, and ste=
 “ down for the Capes ; people employed on bending ca-
 “ bles and stowing anchors and boats, and sundry jobs

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“ of ship’s duty ; so end these 24 hours.—*Thursday,*
 “ 21st *May.* These 24 hours with light winds and
 “ clear weather ; *Cape Henry* light-house bearing N. W.
 “ by W. four miles, lying in the latitude 36. 57. long
 “ 76. 4. W. *from which I take my departure for An-*
 “ *tigua, lying in the lat. 17. 3. and long. 61. 45. W.*
 “ *so God send the good schooner to her destined port in*
 “ *safety. Amen.*” A clearer account of the com-
 mencement of a voyage could not have been given,
 and therefore Mr. *Hall* has not represented the matter
 very ingenuously, when he antedated his voyage from
 the 15th *May.* It could not have been that the ship
 was previously struggling with bad weather, because
 if that had been the case he would have got her re-
 paired before he left the *Chesapeake*, and therefore it
 is impossible to take his representation as a fair ac-
 count of the duration of the voyage and of the danger.
 I must observe, that the evidence of the log-book is to
 be received with jealousy, where it makes for the parties,
 as it may have been manufactured for the purpose ;
 but it is evidence of the most authentic kind against
 the parties, because they cannot be supposed to have
 given a false representation with a view to prejudice
 themselves. The witnesses, when they speak to a fact,
 may perhaps be aware, that it has become a point of con-
 sequence, and may qualify their account of past events
 so as to give a colorable effect to it. But the journal
 is written beforehand, and by persons unacquainted, per-
 haps, with any intention of fraud, and may therefore be
 securely relied on wherever it speaks to the prejudice of
 its authors. In this case the importance of the journal
 is the more striking, because the witnesses refer to it in
 support of their own opinions, and in default of their
 own memory, as That from which the Court is to collect
 the facts in a more accurate and authentic manner.

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But what say these witnesses? The first of them is *Watts*. His account is, “ that he believes Mr. *Hall* to be the owner of her present cargo, which came out of different stores at *Baltimore*, but whose he does not know, as he remained on board to receive it into the vessel. That the fifth or sixth day after they were at sea, they experienced heavy gales of head-wind, which split her jibs and carried away all her braces, fore and aft, and falling short of water, and the vessel's stores falling short. Captain *Hall* told the crew he thought it best to make some port to get repairs, sails, rigging, water, and some stores; at this time the crew and the deponent being worn down with fatigue, so that scarcely a man was able to do his duty, they all cheerfully assented to, and approved of the measure. That Captain *Hall* then said he would bear away for *Halifax*, which he did, and arrived there about the 24th of last month; and on the second day after her arrival at this port, she took in a fresh supply of water, but did not take on board any other article besides the water while he was on board her, which was till the 25th of *June*. That *Davis* kept Mr. *Hall's* watch, and the log-book is headed in his name, and he is there described as Captain *Davis*. That the ship's articles were for a voyage to *Antigua* and back to the States, or if discharged in any other port they were to be paid a month's wages and sent home ;” he also says, “ that he thinks they might have pursued the voyage instead of bearing up for *Halifax*, but he declares by the oath he has taken, it would have been at the risk of the lives of the crew, as the rigging being carried away in the gale, and the jib stay gone, the vessel lay at the mercy of the sea.” But when this same witness is examined again upon the plea given by *Hall*; “ he refers to the log-book for the winds and weather the vessel experienced

experienced on the voyage from Baltimore, where he has truly noted them down, and his memory does not serve him ;" as if after having described all these particulars in his former evidence, his memory would not serve him a few days after. The next witness is *Caleb Smith*, who was taken up at *Baltimore*, and gives the same description of the voyage. *Davis*, the Mate, says, "that the reason why the vessel did not proceed on her voyage to *Antigua* was, meeting with heavy gales of wind, sails much torn, running rigging and jib-stay gone, and water running short. She experienced a good deal of bad weather and head winds continually. She was in the latitude 32. 32. when she shaped her course for *Nova Scotia*, the wind at that time right a head, blowing pretty fresh from the southward ; the jib split, jib stay, and he thinks a shroud gone. *The log-book will state the circumstances, as he does not exactly remember whether it was before or after they bore away, that they carried away her jib ;*" this person then ascribes the deviation, principally, to an accident, of which he does not know whether it took place before or after that event. Now I come to refer to the log-book itself ; it consists of not many articles, and I put it to any man to say, upon the fair consideration of its contents, whether it does not prove it to be quite impossible that this ship came into *Halifax* under anything like stress of weather. The entry on the 21st May, which I have before noticed, concludes in these terms, "Middle part light breezes from the east ; at three A.M. tacked ship, took in the top-sails ; at five tacked ship, saw a 44-gun ship to leeward standing to the westward, took her to be English ; latter part light winds from the S. S. W. : all hands employed in ship's duty ; so end these 24 hours.—Friday, 22d of

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“ of May. These 24 hours begin with strong breezes
 “ from the S. W. and clear weather; middle part
 “ ditto; at four A. M. in M. top sail, reefed the F.
 “ top-sail, and the M. top sail; at six P. M. handed
 “ to F. top-sail in the second reef in M. sail; latter part
 “ heavy gales from S. S. W. stood the jib and main-
 “ sail, hove to under a double reefed fore-sail, *people*
 “ *employed in making nettings*; so end these 24 hours.—
 “ Saturday, 23d of May. These 24 hours begin with
 “ heavy gales from the S. S. W. and thick weather,
 “ with light showers of rain, lying to under a double
 “ reefed fore-sail, a heavy sea running from the S. W.;
 “ at six A. M. made sail jib M. sail and reef fore-top-
 “ sail; latter part more moderate; out reef out of top-
 “ sail and M. sail; *people employed in fitting new slings*
 “ *to the main-yard*; so end these 24 hours. Sunday,
 “ 24. These 24 hours begin with stiff gales from
 “ the S. W. and hazy weather; middle part ditto;
 “ at twelve, in M. top-sail; at six P. M. saw a large
 “ ship to leeward standing to the N. N. W.; at eight
 “ took in the fore-top-sail; latter part hard gales and
 “ cloudy weather; *it being Sunday, no work done*;
 “ so end these 24 hours.—Monday, 25. These 24
 “ hours begin with hard gales from S. S. W. and
 “ thick weather with showers of rain; middle part
 “ heavy gales; handed the M. sail and jib, reefed the
 “ fore-sail; *latter part moderate and clear weather*;
 “ *at six P. M. all sail set, with a pleasant breeze*; *people*
 “ *employed in sundry jobs of ship's duty*; so end these
 “ 24 hours.—Tuesday 26. These 24 hours begin
 “ with *light winds and clear weather from the N. W.*
 “ *all sail set*; at four A. M. saw a schooner standing
 “ to the S. W. with American colours flying; *middle*
 “ *part fresh breezes and clear weather*; *latter part*
 “ *more moderate, hands employed on sundry jobs of ship's*
 “ *duty*;

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" *duty*; so end these 24 hours.—Wednesday, May 27.
 " These 24 hours begin *with light winds and variable*;
 " *middle part ditto*; latter part stiff breezes from the
 " S. W. and cloudy weather; *at two A. M. caught*
 " *a bark*; at six saw a small schooner to leeward,
 " standing upon a wind to S. S. E. took her for a pri-
 " vateer; *people employed in scraping the quarter deck*;
 " so end these 24 hours.—Thursday, May 28.
 " These 24 hours begin with hard gales from the S.
 " S. W. *all sail set to the best advantage*; at four A.
 " M. in M. top-sail reefed M. sail and F. top-sail;
 " middle part ditto; at ten, in fore-top-sail and flying
 " jib; latter part ditto with thick foggy weather;
 " *people employed as usual*; so end these 24 hours.
 " Friday, May 29. These 24 hours begin with stiff
 " gales and smoaky weather from the S. S. W. middle
 " part ditto; latter part heavy squalls of rain and
 " thick cloudy weather, wind from the S. S. W. to
 " W.; *people employed in plaiting sennat*; so end these
 " 24 hours.—Saturday, 30. These 24 hours begin
 " with hard gales and heavy squalls from W. S. W.
 " with rain; *middle part moderate with constant fall*
 " *of rain*; latter part *light winds from the S. S. W.*
 " with thick rainy weather; at six A. M. saw a
 " schooner standing to the S. W., at twelve, spoke
 " with her; from Philadelphia, bound to Porto Rico,
 " out nine days; *all hands employed in sundry jobs of*
 " *ship's duty*.—Sunday, 31. These 24 hours begin
 " with *light airs, almost calm*; tacked ship lying up,
 " E. S. E.; these 24 hours end with *light winds and*
 " *bazy weather*; *this day, being sabbath, no work*
 " *done*.—Monday, June 1. These 24 hours begin
 " with *light winds and smoaky weather*; middle part
 " ditto with stiff breezes and cloudy weather; at six
 " P. M. handed the main top sail; latter part ditto,

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“ with thick smoaky weather ; at eight A.M. saw a
 “ fore-top-sail schooner to leeward standing to the
 “ E.S.E. ; these 24 hours *light winds and smoaky wea-*
 “ *ther, hands employed on ship's duty.*—Tuesday, June 2.
 “ These 24 hours light winds with thick hazy wea-
 “ ther ; at six P. M. saw a schooner to windward
 “ standing to the N. N. W. ; middle part ditto ; *latter*
 “ *part light winds* and thick weather ; so end these
 “ 24 hours *people employed in plaiting sennat*, and sun-
 “ dry jobs of ship's duty.—Wednesday, June 3. These
 “ 24 hours begin with *light winds and thick smoaky*
 “ *weather* ; at six P. M. tacked ship. lying up S. W.
 “ by W. ; middle and latter part strong breezes and
 “ smoaky weather ; *the hands employed in scraping the*
 “ *quarter deck* ; these 24 hours end with strong
 “ breezes and smoaky weather.—Thursday, June 4.
 “ These 24 hours begin with *fresh breezes and clear*
 “ *weather* ; at four P. M. split the jib, reefed it, and
 “ set it again, reefed F. top-sail ; *middle part ditto* and
 “ cloudy weather ; *latter part ditto with light showers*
 “ *of rain* ; these 24 hours end with *fresh breezes* ;
 “ *hands employed in plaiting robins.*—Friday, June 5.
 “ These 24 hours begin with strong breezes and thick
 “ weather with rain ; middle part ditto, *the wind*
 “ *being so constant ahead, and the owner, being on board,*
 “ *thought proper to order us to Halifax* ; latter part
 “ ditto ; at ten A. M. saw a large ship to the N. W.
 “ took her to be a line of battle ship ; these 24 hours
 “ end with strong breezes ; hands employed on ship's
 “ duty.”

Now is it possible to read this, and extract the conclu-
 sion, that the weather was the cause of *Hall's* determi-
 nation to go to *Halifax* ; all the latter days of the voyage
 in no degree menacing ; and no one reason assigned in
 this journal for the change of course but the wind
 being ahead and the owner on board. What does the
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the ship do when she gets to *Halifax*? What must have been her condition, if there were any truth in this account of distress, certainly a condition requiring long and considerable repairs. Mr. *Hall* says, that he arrived at *Halifax* on the 18th of *June*, and on the 20th he applied at the Custom House for his papers, that he might proceed on his voyage. Is this agreeable to the distress set up? Were there any repairs? Nothing is done beyond some little repairs to the sails, and taking in a supply of water. Then it is said that there was a scarcity of water, but it is to be remarked that the vessel only left the land on the 21st of *May*: and on the 4th of *June* there is a deficiency of water. If this were so, it is a criminal improvidence on the part of the claimant, who was bound to provide for the chances of a much more protracted voyage; it was his duty to put on board such a supply as was requisite for the intended voyage. If the water failed within the space of these few days could it be that a reasonable quantity had been put on board? But the truth is, there was no alarming deficiency; for there were 140 gallons of water on board, besides rain water which had been caught, and which was proper for coarser purposes. There is, therefore, as great a failure in this part of the case set up as in every other. There is a passage in the evidence of *Davis*, the mate, which carries with it a very strong confirmation of the suspicion of an antecedent destination to this port of *Halifax*. He is asked where the voyage is to end, and his answer is, "that he cannot undertake to swear where it was to have ended, because the ship's articles say back to any port in *America*. Deponent thought it was meant to be *Halifax*, but could not tell; his reason for thinking so was from hearing *Hall* talk about *Halifax* a good many times," and he goes on to state, "that he cannot undertake to say the vessel

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vessel was in any real distress when she arrived in the port, but her standing jib was entirely gone, and her flying jib much torn, water growing short; he thinks *she might have pursued her voyage to Antigua in safety, but they all thought it would make no difference coming into a British port.*" Here then is a strong ground for supposing the existence of an antecedent purpose of going to *Halifax*, and that it did not arise from the accidents of the voyage. The vessel came in on the 18th of *June*; and it was not till the Custom House Officers were in possession that *Hall* intimated his wish to get the register indorsed, and to complete the bill of sale. But that could not rehabilitate the vessel; she had already committed a breach of the law, and was in possession of the officers of the Customs. It has been argued that these goods could not have been intended for importation at *Halifax* as they are not adapted for that market; of the weight of that argument the Court below was from local knowledge much better qualified to judge. I may however observe that these same goods are amongst those enumerated in the statute which gives the Governor of *Nova Scotia* an authority to permit their importation, and it is clear therefore that there is an occasional demand for them.

I have entered into these facts more minutely, because I am not ignorant that this case has been made the subject of an outcry, in which the Judge of the Court below, and the officers of the Crown, have been treated with sufficient freedom. I must advise parties, that if they feel themselves aggrieved by the sentence of a Court of Justice, this is not the species of remedy which the Law has provided for them. The true remedy is to be pursued by a regular cause of appeal in the tribunals appointed to correct errors, and not by partial and inflamed complaints against persons in judicial situations, preferred behind their

their backs and in quarters where such complaints cannot be judicially examined. What would be unfair towards individuals is not less so when directed against Courts of Justice. I do not however sit here to decide upon the character and conduct of the Judge and officers of the Crown at *Halifax*, but to determine the legal merits of this case. From the conclusions I have drawn from the evidence it will be inferred, that I approve the sentence which has been given; Mr. *Hail's* intentions may be honest, for they are known only to himself, I can judge of them only from facts, and such facts as appear in the evidence which is furnished, and judging from that evidence, I do, without hesitation, affirm the sentence appealed from. *

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* See App. E.

BOLLETTA, TRUMPEY.

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1809.

THIS was the case of a *Danish* ship, bound on a voyage from *Zante* to *Copenhagen*, with a cargo documented as the property of merchants resident in the *Seven Islands*, and captured on the 31st of *August* 1807, by the *Snap Dragon* privateer. Proceedings were commenced against the ship and cargo by the captor, when the King's Proctor intervened for the Crown on the ground that the capture was made prior to the declaration of hostilities against *Russia*.

Occupation of territory in times of peace, with the concurrence of the sovereign—presumptive evidence that it is the result of cession by treaty.

On the Part of the Captor—It was argued that these islands had been ceded to *France* prior to the capture; that they had become part of *France*, and consequently that the cargo was the property of *French* subjects, and as such must be condemned to the Captor.

For the Crown it was contended—That the cession of those islands to *France* was only matter of conjecture founded upon vague rumours circulated in some

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some of the foreign journals ; that if the Captors relied upon the fact of cession it was incumbent on them to shew that it had taken place.

The Court interfered and observed, that although regularly it was the business of the party making the assertion to adduce evidence of the fact, upon which he relied ; yet in this case he should direct the Proctor for the Crown to apply to Government for information, as in his official situation he could make the application with more facility than the Proctor for the Privateer.

On a subsequent day the cause came again before the Court, when the King's Proctor brought in the following answer which had been received from the office of the Secretary of State : " Foreign Office, " *February 20th 1809.* Mr. *Bagot* presents his compliments to Mr. *Bishop*, and in answer to the " question contained in the inclosed paper, he has " the honour to inform him that the cession to *France* " of the *Ionian* Republic was only made known to the " *British* Government by the fact of its occupation by " the *French* troops some months after the signature " of the peace of *Tilsit*. It is not in the patent articles " of that peace." At the same time further evidence was furnished on the part of the Captor, consisting of an extract from the log book of the *Weazle* sloop of war, which was cruizing off the *Seven Islands* at that period, together with an affidavit of Captain *Clavell* her commander.

JUDGMENT.

Sir *William Scott*.—The question in this case is, whether the capture took place subsequent to the cession of these islands to *France* by the Emperor of *Russia* ; for if the fact was so, upon the principle laid down by the Court in the *Kniphausen* cases, the captors will be entitled to the benefit of the condemnation.

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The capture took place on the 31st of *August*, and it can hardly be denied that the *Seven Islands* were in the possession of the *French* at that time; but when the case came on before, it was objected that there was no evidence to shew that this was any thing more than a mere temporary possession, except some loose suggestions in the foreign newspapers, which required to be supported by proofs of a more authentic nature. With this view the Court directed an application to be made to the Secretary of State for the Foreign Department, for information respecting the time when the cession of those islands to *France* took place. The answer which has been received is not very satisfactory as to the point at issue. But in order to supply this deficiency of information the captors have brought in an extract from the log-book of the *Weazle* sloop of war, which was cruising in that neighbourhood at the time, with an affidavit of Captain *Clavell*, her commander. On the part of the Crown it has been contended that the possession taken by the *French* was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true where possession has been taken by force of arms and by violence; but this is not an occupation of that nature: *France* and *Russia* had settled their differences by the treaty of *Tilsit*, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of *Russia*. This is the light in which it is viewed in His Majesty's declaration, and although in the answer received from the Secretary of State's office, the time when it may have taken place is not mentioned, yet there is a distinct admission of the fact. But the affidavit of Captain *Clavell*, and the extract
from

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from his log-book, furnish evidence of a more decisive nature. He states that “ he proceeded with the
“ *Weazle* towards the harbour of *Corfu*, on 23d of
“ *August* 1807, and upon going ashore there for the
“ purpose of waiting on the *British* Minister, he
“ found that he had been obliged to fly, and that
“ *Corfu* was actually in possession of *French* troops;
“ that, on his return on board the *Weazle*, he found
“ an *Englishman*, who had been sent on board by
“ Mr. *Kirke*, the *British* Vice-Consul at *Corfu*, with
“ information that the said place was in possession of
“ the *French*, and had been for several days; that
“ the deponent went to sea immediately, and on the
“ following morning captured some vessels with
“ *French* troops on board, bound to *Corfu* and other
“ places in the *Seven Islands*; that the deponent was
“ then informed that *Corfu*, *Zante*, *Cephalonia*, and
“ other islands belonging to *Russia*, commonly called
“ the *Seven Islands*, had been ceded to the *French*,
“ who took possession thereof on the 12th of *August*,
“ and that part of the *French* troops had been conveyed thither on board of and under the protection of *Russian* ships.”—Now this is a fact which proves that it was a voluntary surrender on the part of *Russia*, in consequence of a previous cession, and that it was not an hostile occupation by force of arms liable to be lost again the next day. It was a cession made by *Russia* at a time when she was linked with *France* in the closest ties of amity. No other evidence is to be procured, and I am of opinion that there is sufficient to satisfy the Court that at the time of the capture, these islands had been transferred to *France*, and consequently that this property is subject to the commission of war held by this privateer.

APPENDIX.

A.

NOTE to page 2.

ORDER IN COUNCIL, 19th November 1806.

WHEREAS it has been represented to His Majesty, that it would be expedient in the present circumstances to permit, Trade to St. Domingo.
under certain rules and regulations, a commercial intercourse to be carried on in *British* vessels navigated according to law, from the free ports in the *Bahama Islands*, and the port of *Road Harbour* in the island of *Tortola*, to such ports and places in the island of *St. Domingo* as are not or shall not be under the dominion and in the actual possession of His Majesty's enemies; His Majesty, by and with the advice of His Privy Council, is pleased to authorize, and doth hereby authorize the Governor of the *Bahama Islands*, and the Governor in the *Leeward Islands*, (or the President of the Council residing in the island of *Tortola*, and the Chief Justice and Collector of the Customs of the said island, if by writing under the Hand and Seal of the Governor of the *Leeward Islands* they shall be deputed for that purpose), and each of them, to grant licences under their hands and seals respectively, but in His Majesty's name, to *British* vessels navigated according to law, to clear out from the port of *Road Harbour* in the island of *Tortola*, and from the free ports in the *Bahama Islands* respectively, with cargoes of the produce or manufacture of the United Kingdom of *Great Britain* and *Ireland*, and salt from the *Bahama Islands*, to such ports or places in the island of *St. Domingo* as are not or shall not be under the dominion and in the actual possession of any of His Majesty's enemies, (the name of the vessel, and the port or ports to which the vessel is bound, to be inserted in every such licence), and to bring back from such ports in the said island to the free ports in the *Bahama Islands*, or to the port of *Road Harbour* in the island of *Tortola*, or to some port of the United Kingdom, any articles the produce of the said island of *St. Domingo*; such articles of produce

[a]

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duce to be in all respects subject to the duties and regulations to which the produce of foreign islands is by law subject: Provided, however, that such vessels shall not carry any sugar to the said island of *St. Domingo*, nor carry any negroes, either to or from the said island. And His Majesty is further pleased to direct, that every licence so granted shall be entered upon record in the proper office, and an account thereof be transmitted to His Majesty's Secretary of State for the Colonial Department. And His Majesty doth hereby order and command all and every the commanders and officers of His ships and vessels of war, and the commanders of all private ships of war, and others whom it may concern, to suffer all and every such ships and vessels having such licences as aforesaid, and conforming to the regulations therein prescribed, to pass and repass upon their respective voyages, which shall be described in such licences. And in case, through ignorance, or in breach of this His Majesty's Order in Council, any ships or vessels having such licence as aforesaid, shall be brought in for adjudication, His Majesty doth hereby further order and command, that they shall forthwith be released by His Majesty's Court of Admiralty, upon proof that the parties have duly conformed to the regulations and restrictions prescribed in the said licence.

(Signed)

W. FAWKENER.

B.

NOTE to page 2.

INSTRUCTION, 11th February 1807.

Relief to Ships
cleared out for
Buenos Ayres.

OUR will and pleasure is, that all *British* vessels which have cleared out for any of the ports of Our United Kingdom to *Buenos Ayres* and the river *Plata*, may be permitted, either to proceed without interruption to any port of the island of *St. Domingo*, not in the immediate possession and under the controul of *France* or *Spain*, there to dispose of their cargoes, and to lade produce in return, and to carry the same to any port of our United Kingdom, or to tranship their cargoes on board neutral vessels, and to send the same for sale to any hostile colony, and to bring back returns on board such neutral vessels, to any port of our United Kingdom.

By His Majesty's Command,

(Signed)

SPENCER.

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C.

NOTE to page 2.

ORDER IN COUNCIL, 15th July 1807.

WHEREAS it has been represented to His Majesty, that it ^{Trade to}
would be expedient in the present circumstances to permit, ^{St. Domingo.}
under certain rules and restrictions, a commercial intercourse to be
carried on in *British* vessels, navigated according to law, from the
province of *Nova Scotia* to such ports and places in the island of
St. Domingo, as are not or shall not be under the dominion and in
the actual possession of the government of *France* or *Spain*; His
Majesty, by and with the advice of His Privy Council, is pleased
to authorize, and doth hereby authorize the Governor of the said
province of *Nova Scotia*, to grant licences under his hand and seal,
but in His Majesty's name, to *British* vessels, navigated according
to law, to clear out from any port of the said province of *Nova*
Scotia, with cargoes of the produce of the said province of *Nova*
Scotia, or any *British* colony or plantation, or of the produce or
manufacture of the United Kingdom of *Great Britain* and *Ireland*,
to such ports and places in the island of *St. Domingo*, as are not or
shall not be under the dominion and in the actual possession of the
government of *France* or *Spain*, (the name of the vessel and the ports
to and from which the vessel is bound to be inserted in any such
licence), and to bring back from such ports in the said island, to
some port of the said province of *Nova Scotia*, or to some port of
the United Kingdom, any articles the produce of the said island
of *St. Domingo*, such articles of produce to be in all respects subject
to the duties and regulations to which the produce of foreign
islands is by law subject: Provided, however, that such vessels shall
not carry any sugar to the said island of *St. Domingo*, nor carry any
negroes either to or from the said island. And His Majesty is fur-
ther pleased to direct, that every licence so granted shall be entered
upon record in the proper office, and an account thereof be trans-
mitted to His Majesty's Secretary of State for the Colonial De-
partment. And His Majesty doth hereby order and command all
and every the commanders and officers of His Majesty's ships and
vessels of war, and the commanders of all private ships of war, and
all others whom it may concern, to suffer all and every such ships
and vessels, having such licence as aforesaid, and conforming to the
regulations therein prescribed, to pass and repass upon their re-
spective voyages which shall be described in such licences. And

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in case through ignorance, or in breach of this His Majesty's Order in Council, any ships or vessels having such licence as aforesaid, shall be brought in for adjudication, His Majesty doth hereby further order and command, that they shall forthwith be released by His Majesty's Courts of Admiralty, upon proof that the parties have duly conformed to the regulations and restrictions prescribed in the said licences.

(Signed) STEPHEN COTTRELL.

D.

NOTE to page 4.

PELICAN, BURKE.

IN the case of the *PELICAN, Burke*, the same question occurred in the Court of Appeal 6th May 1809.—It was the case of a vessel under *Danish* colours, captured on a voyage from *Port au Prince* to *New York* with a return cargo of coffee, &c.—The Judgment of the Court was delivered by Sir *William Grant* to the following effect:

“ Although it was matter of notoriety, that a considerable part of *St. Domingo* had been emancipated from the dominion of *France*, yet, when the former cases (*Dart* and *Happy Couple*) were decided, we thought there was no sufficient ground to authorize the Court to presume a change in its national character. It always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide. Now, although the cases of the *Dart* and *Happy Couple*, involving that question, did not come on for hearing before this Board until some time after the subsequent Orders in Council had issued, yet those Orders were not in existence at the time when the captures took place. But they had been promulgated *previously* to the present capture; and we are of opinion that they do contain a recognition on the part of His Majesty's Government, that there are ports and places in *St. Domingo* not only not in the possession, but also not under the *dominion* of *France*. The only ground for condemnation in this case is the trading from a hostile colony; but that cannot apply to those parts of it which are not considered or held to be under the *dominion* of the

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the enemy; and therefore the real question is as to the description and character of the port or place from which the vessel was trading. It is evident, that whatever may have been the motive for granting these licences under the Orders in Council, it could not be to sanction or authorize a trade with such parts of the colony as are hostile, because in the orders themselves a distinction is taken as to different parts of *St. Domingo*, to some of which a trade is permitted, to others not. It was not necessary that government should have ascertained in what way affirmatively *St. Domingo* should be politically and commercially considered. It is sufficient for the present question, that the Orders negative a hostile character applying to certain parts of the colony; and it was not contended in argument, that the port from which this vessel sailed was not one of those to which these subsequent Orders would apply. We are therefore of opinion that this property must be restored; but as the question is altogether new, we think the captors ought to be reimbursed in their expences.

NOTE to page 17.

ORDER of COUNCIL, 7th *January* 1807.

WHEREAS the *French* government has issued certain orders, which, in violation of the usages of War, purport to prohibit the commerce of all neutral nations with His Majesty's dominions, and also to prevent such nations from trading with any other country, in any articles the growth, produce, or manufacture of His Majesty's dominions: Trade with enemies ports restricted.

And whereas the said government has also taken upon itself to declare all His Majesty's dominions to be in a state of blockade, at a time when the fleets of *France* and her allies are themselves confined within their own ports by the superior valour and discipline of the *British* navy:

And whereas such attempts on the part of the enemy would give to His Majesty an unquestionable right of retaliation, and would warrant His Majesty in enforcing the same prohibition of all commerce with *France*, which that power vainly hopes to effect against the commerce of His Majesty's subjects; a prohibition which the superiority of His Majesty's naval forces might enable him to support, by actually investing the ports and coasts of the enemy

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enemy with numerous squadrons and cruisers, so as to make the entrance or approach thereto manifestly dangerous :

And whereas His Majesty, though unwilling to follow the example of His enemies, by proceeding to an extremity so distressing to all nations not engaged in the war, and carrying on their accustomed trade, yet feels Himself bound, by a due regard to the just defence of the rights and interests of His people, not to suffer such measures to be taken by the enemy, without taking some steps on His part to restrain this violence, and to retort upon them the evils of their own injustice :

His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that no vessel shall be permitted to trade from *one port to another*, both which ports shall belong to or be in the possession of *France* or her allies, or shall be so far under their controul as that *British* vessels may not freely trade thereat ; And the commanders of His Majesty's ships of war and privateers shall be, and are hereby instructed to warn every neutral vessel coming from any such port, and destined to another such port, to discontinue her voyage, and not to proceed to any such port ; and any vessel after being so warned, or any vessel coming from any such port, after a reasonable time shall have been afforded for receiving information of this His Majesty's order, which shall be found proceeding to another such port, shall be captured and brought in, and, together with her cargo, shall be condemned as lawful prize. And His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judges of the High Court of Admiralty and Courts of Vice-Admiralty, are to take the necessary measures herein, as to them shall respectively appertain.

(Signed) W. FAWKENER.

NOTE to page 32.

ORDER of COUNCIL, 11th November 1807.

Respecting
Trade, as pro-
hibited, to ports
in the possession
of the enemy,
&c.

WHEREAS certain orders, establishing an unprecedented system of warfare against this kingdom, and aimed especially at the destruction of its commerce and resources, were, some time since, issued by the government of *France*, by which "the *British* islands

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islands were declared to be in a state of blockade (a),” thereby
subjecting to capture and condemnation all vessels with their
cargoes

(a) FRENCH DECREE.

November 21, 1806.

French Decree
21st Nov.
26th Dec. 1807.

The annexed translation of the Decree of 21st November,
which appeared in the public papers, has been corrected
by the official communication in the *Moniteur*.

Napoleon, Emperor of the *French*, and King of *Italy*.

Considering,

1. That *England* does not acknowledge the laws generally ob-
served by all civilized nations.

2. That she regards every individual as an enemy who belongs
to an enemy's state, and consequently makes prisoners of war, not
only of the crews of ships of war, but also of the crews of merchant
vessels, and even supercargoes and merchants who are proceeding
in their course of trade.

3. That she extends to merchant ships, and to wares, and to
property of private persons, that right of conquest which ought
only to be applied to property belonging to the hostile states.

4. That she extends the right of blockade to commercial un-
fortified towns, and to ports, harbours, and mouths of rivers,
which, according to the principles and practice of all civilized
nations, is only applicable to fortified places.

That she declares places in a state of blockade, before which
she has not a ship of war, though no place can be considered in a
state of blockade, unless it is so invested, that approach cannot be
attempted without imminent danger.

That she even declares places in a state of blockade, which,
with all her forces united, she is incapable of blockading, namely,
whole coasts and empires:

5. That this monstrous abuse of the right of blockade has no
other object than to obstruct the communication of nations with
each other, and to raise the trade and the industry of *England*,
upon the ruin of the trade and industry of the nations of the
continent.

6. That, since such is the object of *England*, whoever is con-
cerned in the commerce of *English* merchandize on the continent,
thereby favours her views, and becomes her accomplice.

b 3

7. That

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cargoes, which should continue to trade with His Majesty's dominions :

And

7. That this conduct on the part of *England*, which is only worthy of the earliest ages of barbarism, has redounded to the advantage of that state, and to the injury of all others.

8. That it is a natural right to oppose an enemy with the same weapons he employs, and to combat him by the same means which he employs against others, especially when that enemy disclaims all ideas of justice, and all the liberal sentiments, which have resulted from the civilization of mankind.

We have resolved to direct against *England* the same system which she has established by her maritime code. The regulations of the present decree shall therefore be henceforth considered as forming a fundamental law of the empire, until *England* shall acknowledge that the right of war is the same by land as by sea—that it does not extend to private property, of any kind whatever, or to the persons of individuals unconnected with the profession of arms, and that the right of blockade is limited to fortified places, actually invested by a sufficient force. We have therefore decreed, and do hereby decree, as follow :

Article 1. The *British* Isles are declared in a state of blockade.

2. All trade and all correspondence with the *British* Isles are prohibited.

Consequently, all letters or packets that are addressed to *England*, or to *Englishmen*, or which are written in the *English* language, shall not henceforth be forwarded by post, but shall be seized.

3. Every individual *English* subject, of whatever rank or condition, who shall be found in any country occupied by our troops, or the troops of our allies, shall be considered as a prisoner of war.

4. Every magazine, every kind of merchandize, every species of property, be it what it may, which belongs to an *English* subject, shall be considered as lawful prize.

5. Trade in *English* merchandize is prohibited ; and all merchandize that belongs to *England*, or that is the produce of her manufactures of colonies, is declared lawful prize.

6. A moiety of the produce of the confiscated property, which, by the foregoing articles, is declared lawful prize, shall be appropriated to the merchants, to indemnify them for the loss they have sustained

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And whereas by the same orders, "all trading in English ^{Preamble.}
"merchandize is prohibited, and every article of merchandize
"belonging

sustained from the capture of their merchant vessels by *English* cruizers.

7. No ship which comes direct from *England*, or the *English* colonies, or which shall have been there, after the publication of the present decree, shall be permitted to enter any of our harbours.

8. Every ship trading by means of a false declaration, in contravention of the above mentioned regulations, shall be detained, and the ship and lading shall be confiscated, as if they were *English* property.

9. Our Tribunal des Prizes at *Paris* is invested with the power of definitively deciding all questions which may arise within our empire, or in the countries occupied by the *French* armies, in respect to the execution of our present decree. Our Tribunal des Prizes at *Milan* is invested with the power of definitively deciding such questions as may arise within the limits of our Kingdom of *Italy*.

10. The communication of the present decree shall be made by our Minister of Foreign Relations to the Kings of *Spain*, *Naples*, *Holland*, and *Etruria*, and to our other allies, whose subjects are, as well as our own, the victims of the injustice and barbarism of the *English* maritime code.

11. Our ministers of foreign relations, of war, marine, finance, and police, and our director general of the posts, are, in their respective departments, charged with the execution of our present decree :

The following Decree of increased severity, has appeared since ^{Farther French}
in the public papers ; but the Editor has had no opportunity ^{Decree.}
of comparing it with an authenticated copy.

Paris, 26th December 1807.

Napoleon, emperor of the *French*, king of *Italy*, and protector of the *Rhenish* confederation :--Observing the measures adopted by the *British* government, on the 11th of *November* last, by which vessels belonging to neutral, friendly, or even powers the allies of *England*, are made liable, not only to be searched by *English* cruizers, but to be compulsorily detained in *England*, and to have a tax laid on them of so much *per cent.* on the cargo, to be

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“ belonging to *England*, or coming from her colonies or of her manufactures, is declared lawful prize:”

And

regulated by the *British* legislature—observing that by these acts the *British* government denationalizes ships of every nation in *Europe*, that it is not competent for any government to detract from its own independence and rights, all the sovereigns of *Europe* having in trust the sovereignties and independence of the flag; that if by an unpardonable weakness, and which, in the eyes of posterity, would be an indelible stain, such a tyranny was allowed to be established into principles, and consecrated by usage, the *English* would avail themselves of it to assert it as a right, as they have availed themselves of the tolerance of governments to establish the infamous principle, that the flag of a nation does not cover goods, and to give to their right of blockade an arbitrary extension, and which infringes on the sovereignty of every state; we have decreed, and do decree as follows:

Art. 1. Every ship, to whatever nation it may belong, that shall have submitted to be searched by an *English* ship, or to a voyage to *England*, or that shall have paid any tax whatsoever to the *English* government, is thereby, and for that alone, declared to be denationalized, to have forfeited the protection of its king, and to have become *English* property.

2. Whether the ships thus denationalized by the arbitrary measures of the *English* government, enter into our ports, or those of our allies, or whether they fall into the hands of our ships of war, or of our privateers, they are declared to be good and lawful prizes.

3. The *British* islands are declared to be in a state of blockade, both by land and sea. Every ship, of whatever nation, or whatsoever the nature of its cargo may be, that sails from the ports of *England*, or those of the *English* colonies, and of the countries occupied by *English* troops, and proceeding to *England*, or to the *English* colonies, or to countries occupied by *English* troops, is good and lawful prize, as contrary to the present decree, and may be captured by our ships of war, or our privateers, and adjudged to the captor.

4. These measures, which are resorted to only in just retaliation of the barbarous system adopted by *England*, which assimilates its legislation to that of *Algiers*, shall cease to have any effect with respect

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And whereas the nations (a) in alliance with *France*, and under her controul, were required to give, and have given, and do give, effect to such orders :

And

spect to all nations, who shall have the firmness to compel the *English* Government to respect their flag. They shall continue to be rigorously in force, as long as that government does not return to the principle of the law of nations, which regulates the relation of civilized states in a state of war. The provisions of the present decree shall be abrogated and null, in fact, as soon as the *English* abide again by the principles of the law of nations, which are also the principles of justice and honour.

All our ministers are charged with the execution of the present decree, which shall be inserted in the Bulletin of the laws.

(a) SPANISH DECREE.

Aranjuez, 19th February 1807.

Spanish corresponding decree,
19th Feb. 1807.

By the greatest outrage against humanity and against policy, *Spain* was forced by *Great Britain* to take part in the present war. This power has exercised over the sea, and over the commerce of the world, an exclusive dominion. Her numerous factories, disseminated through all countries, are like sponges, which imbibe the riches of those countries, without leaving them more than the appearances of mercantile liberty. From this maritime and commercial despotism, *England* derives immense resources for carrying on a war, whose object is to destroy the commerce which belongs to each state from its industry and situation. Experience has proved that the morality of the *British* cabinet has no hesitation as to the means, so long as they lead to the accomplishment of its designs ; and whilst this power can continue to enjoy the fruits of its immense traffic, humanity will groan under the weight of a desolating war. To put an end to this, and to obtain a solid peace, the Emperor of the *French* and King of *Italy* issued a decree on the 21st of *November* last, in which, adopting the principle of reprisals, the blockade of the *British* Isles is determined on ; and his Ambassador, his Excellency *Francis de Bourbarnois*, Grand Dignitary of the Iron Crown, of the Legion of Honour, &c. &c. having communicated this decree to the King our master ; and his Majesty being desirous to co-operate by means sanctioned by the right of reciprocity, has been pleased to authorise his most Serene Highness,

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And whereas His Majesty's order of the 7th of *January* last has not answered the desired purpose, either of compelling the enemy

ness, the Prince Generalissimo of the Marine, to issue a circular of the following tenor :

As soon as *England* committed the horrible outrage of intercepting the vessels of the royal marine, insidiously violating the good faith with which peace assures individual property, and the rights of nations, his Majesty considered himself in a state of war with that power, although his Royal Soul suspended the promulgation of the Manifesto, until he saw the atrocity committed by its seamen, sanctioned by the government of *London*. From that time, and without the necessity of warning the inhabitants of these Kingdoms of the circumspection with which they ought to conduct themselves towards those of a Country, which disregards the sacred laws of property, and the rights of nations, his Majesty made known to his subjects the state of war, in which he found himself with that nation. All trade, all commerce, is prohibited in such a situation ; and no sentiments ought to be entertained towards such an enemy, which are not dictated by honour ; avoiding all intercourse which might be considered as the vile efforts of avarice, operating on the subjects of a nation which degrades itself in them. His Majesty is well persuaded that such sentiments of honour are rooted in the hearts of his beloved subjects ; but he does not choose on that account to allow the smallest indulgence to violators of the law, nor permit, that through their ignorance they should be taken by surprise ; authorizing me by these presents to declare that all *English* property will be confiscated whenever it is found on board a vessel, although a neutral, if the consignment belongs to *Spanish* individuals. So likewise will be confiscated all merchandize that may be met with, although it may be in neutral vessels, whenever it is destined for *England* or her Isles. And, finally, his Majesty, conforming himself to the ideas of his Ally, the Emperor of the *French*, declared in his states the same law which, from principles of reciprocity and suitable respect, his Imperial Majesty promulgated under the date of the 21st *November* 1806.

The execution of this determination of his Majesty belongs to the chief of the provinces, of departments, and of vessels (baxels) and communicating it to them in the name of his Majesty, I hope they will leave no room for the royal displeasure. God preserve you many years.

The Prince Generalissimo of the Marine.

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to recal those orders, or of inducing neutral nations to interpose with effect, to obtain their revocation, but, on the contrary, the same have been recently enforced with increased rigour:

And whereas His Majesty, under these circumstances, finds Himself compelled to take further measures for asserting and vindicating His just rights, and for supporting that maritime power, which the exertions and valour of His people have, under the blessing of Providence, enabled him to establish and maintain; and the maintenance of which is not more essential to the safety and prosperity of His Majesty's dominions, than it is to the protection of such states as still retain their independence, and to the general intercourse and happiness of mankind:

1. His Majesty is therefore pleased, by and with the advice of His privy Council, to order, and it is hereby ordered, that all the ports and places of *France* and her allies, or of any other country at war with His Majesty, and all other ports or places in *Europe* from which, although not at war with His Majesty, the *British* flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, shall, from henceforth, be subject to the same restrictions in point of trade and navigation, with the exceptions herein-after mentioned, as if the same were actually blockaded by His Majesty's naval forces, in the most strict and rigorous manner:

All ports from which the *British* flag is excluded, restricted.

2. And it is hereby further ordered and declared, that all trade in articles which are of the produce or manufacture of the said countries or colonies, shall be deemed and considered to be unlawful; and that every vessel trading from or to the said countries or colonies, together with all goods and merchandize on board, and all articles of the produce or manufacture of the said countries or colonies, shall be captured, and condemned as prize to the captors.

Trade in produce and manufactures of such places, unlawful.

3. But although His Majesty would be fully justified, by the circumstances and considerations above recited, in establishing such a system of restrictions with respect to all the countries and colonies of His enemies, without exception or qualification; yet His Majesty, being nevertheless desirous not to subject neutrals to any greater inconvenience, than is absolutely inseparable from the carrying into effect His Majesty's just determination to counteract the designs of His enemies, and to retort upon His enemies themselves the consequences of their own violence and injustice; and being yet willing to hope that it may be possible, consistently with that object, still to allow to neutrals the opportunity of furnishing themselves

Exceptions.

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themselves with colonial produce, for their own consumption and supply ; and even to leave open, for the present, such trade with His Majesty's enemies, as shall be carried on directly with the ports of His Majesty's dominions, or of His allies, in the manner herein-after mentioned :

As to ships coming from their own unrestricted ports direct, or some free port of His Majesty's colonies, to the enemies colonies, or *conversely*.

4. His Majesty is therefore pleased further to order, and it is hereby ordered, that nothing herein contained shall extend to subject to capture or condemnation any vessel, or the cargo of any vessel, belonging to any country not declared by this order, to be subjected to the restrictions incident to a state of blockade, which shall have cleared out with such cargo from some port or place of the country to which she belongs, either in *Europe* or *America* ; or from some free port of His Majesty's colonies, under circumstances in which such trade from such free port is permitted, direct to some port or place in the colonies of His Majesty's enemies, or from those colonies direct to the country to which such vessel belongs, or to some free port in His Majesty's colonies, in such cases, and with such articles, as it may be lawful to import into such free port ;

or from this Kingdom, Gibraltar, or Malta, to ports specified in the clearances, under regulations to be prescribed.

5. Nor to any vessel, or the cargo of any vessel, belonging to any country not at war with His Majesty, which shall have cleared out from some port or place in this kingdom, or from *Gibraltar* or *Malta*, under such regulations as His Majesty may think fit to prescribe, or from any port belonging to His Majesty's allies, and shall be proceeding direct to the port specified in her clearance ;

or from restricted ports to ports of His Majesty in Europe.

6. Nor to any vessel, or the cargo of any vessel, belonging to any country not at war with His Majesty, which shall be coming from any port or place in *Europe* which is declared by this order to be subject to the restrictions incident to a state of blockade, destined to some port or place in *Europe* belonging to His Majesty, and which shall be on her voyage direct thereto :

Limitation.

7. But these exceptions are not to be understood as exempting from capture or confiscation any vessel or goods, which shall be liable thereto, in respect of having entered or departed from any port, or place actually blockaded, by His Majesty's squadrons or ships of war, or for being enemies' property, or for any other cause than the contravention of this present order.

Direction to cruizers for warning, &c.

8. And the commanders of His Majesty's ships of war and privateers, and other vessels acting under His Majesty's commission, shall be, and are hereby, instructed to warn every vessel which shall have commenced her voyage prior to any notice of this order, and shall be destined to any port of *France*, or of her allies,

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allies, or of any other country at war with His Majesty, or to any port or place from which the *British* flag as aforesaid is excluded, or to any colony belonging to His Majesty's enemies, and which shall not have cleared out as is herein-before allowed, to discontinue her voyage, and proceed to some port or place in this kingdom, or to *Gibraltar* or *Malta*;

9. And any vessel which, after having been so warned, or after a reasonable time shall have been afforded for the arrival of information of this His Majesty's order at any port or place from which she sailed, or which after having notice of this order, shall be found in the prosecution of any voyage contrary to the restrictions contained in this order, shall be captured, and, together with her cargo, condemned as lawful prize to the captors.

Specific periods assigned for constructive notice.

10. And whereas countries, not engaged in the war, have acquiesced in the orders of *France*, prohibiting all trade in any articles the produce or manufacture of His Majesty's dominions; and the merchants of those countries have given countenance and effect to those prohibitions, by accepting from persons styling themselves commercial agents of the enemy, resident at neutral ports, certain documents, termed "Certificates of Origin," being certificates obtained at the ports of shipment, declaring that the articles of the cargo are not of the produce or manufacture of His Majesty's dominions, or to that effect: And whereas this expedient has been directed by *France*, and submitted to by such merchants, as part of the new system of warfare directed against the trade of this kingdom, and as the most effectual instrument of accomplishing the same, and it is therefore essentially necessary to resist it:

Certificates of origin.

11. His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that if any vessel, after reasonable time shall have been afforded for receiving notice of this His Majesty's order, at the port or place from which such vessel shall have cleared out, shall be found carrying any such certificate or document as aforesaid, or any document referring to, or authenticating the same, such vessel shall be adjudged lawful prize to the captor, together with the goods laden therein, belonging to the person or persons by whom or on whose behalf any such document was put on board.

Ship and goods having certificates of origin, after notice, good prize.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State,

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the Lords Commissioners of the Admiralty, and the Judges of the High Courts of Admiralty and Courts of Vice Admiralty, are to take the necessary measures herein, as to them shall respectively appertain.

W. FAWKENER.

NOTE to page 70.

ORDER IN COUNCIL, 21st September 1808.

Restitution of
Portuguese pro-
perty detained
under former
orders.

WHEREAS His Majesty was pleased, by his Orders in Council, of the 6th of *January* and 4th of *May* last, to direct certain measures to be taken for the care and custody of *Portuguese* property belonging to persons residing in *Portugal*, or elsewhere, under the controul of *France*, which had been detained by *British* cruizers, and to subject such property to the future disposition of the Prince Regent of *Portugal*, in consideration of the owners not being entitled to the possession of it while they remained under the controul of the enemy :

And whereas the deliverance of *Portugal* from such controul has since been effected, and the inhabitants of that country are again become duly qualified to receive the restitution of their property ; His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That all *Portuguese* property shall be forthwith restored to the respective owners thereof, or their lawful agents ; and the persons appointed by virtue of the Order in Council of the 6th of *January* last, for the care and management of the *Portuguese* property, are hereby ordered to restore the same accordingly ; such property nevertheless being subject to the payment of the legal charges thereon, and of the expences justly incurred in respect thereto ; and all questions respecting the ownership of such property, where any doubt shall be entertained by the persons aforesaid, with respect to the same, and the charges and expences thereon, shall be decided upon summarily by the High Court of Admiralty, or the Court of Vice Admiralty, in which such property may have been brought to adjudication. And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and the Judges of the High Courts of Vice Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

(Signed) W. FAWKENER,

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NOTE to page 122.

ORDER IN COUNCIL, 11th November 1807.

WHEREAS the sale of ships by a belligerent to a neutral is considered by *France* to be illegal: Prohibiting the sale of enemies ships,

And whereas a great part of the shipping of *France* and her allies has been protected from capture during the present hostilities, by transfers, or pretended transfers to neutrals:

And whereas it is fully justifiable to adopt the same rule, in this respect, towards the enemy, which is applied by the enemy to this country:

His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that in future the sale to a neutral of any vessel belonging to His Majesty's enemies, shall not be deemed to be legal, nor in any manner to transfer the property, nor to alter the character of such vessel. And all vessels now belonging, or which shall hereafter belong to any enemy of His Majesty, notwithstanding any sale, or pretended sale to a neutral, after a reasonable time shall have elapsed for receiving information of this His Majesty's order, at the place where such sale, or pretended sale, was effected, shall be captured and brought in, and shall be adjudged as lawful prize to the captors,

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judges of the High Court of Admiralty and Courts of Vice Admiralty, are to take the necessary measures herein as to them shall respectively appertain.

W. FAWKENER,

E.

In His Majesty's High Court of Delegates.

PAISLEY, JACKWAYS.

THIS was the case of an *American* brig with a general cargo of provisions, and having on board also *three bales of cottons; twenty-seven boxes of soap, and seventeen boxes of candles*; the ship was seized in the port of *Kingston in Jamaica* by the waiter and searcher

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1809.

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searcher of the port, and proceeded against in the Vice Admiralty Court there for a breach of the revenue laws, by importing the said cottons, soap, and candles.

The brig and general cargo and the cottons were claimed as the property of Messrs. *Scott and Tremain of New York*, and the soap, candles, and a few other trifling articles, as the private adventure of the master and mate.

In the Vice Admiralty Court at *Jamaica*, the brig and the whole of the cargo were condemned; and on appeal to the High Court of Admiralty, that judgment was affirmed.

On the ulterior appeal to the Court of Delegates, the case was argued on the part of the Crown by His Majesty's Advocate and the Attorney General, and on that of the claimants by Dr. *Stoddart* and Mr. *Stephen*.

The circumstances of the case were these:—On the 17th *July* 1800, a resolution of the Lieutenant Governor and Council of *Jamaica* issued, allowing the importation of provisions in neutral vessels “on the like terms, stipulations, charges, and conditions, as are observed with respect to *British* vessels in the like cases;” and this resolution continued in force until *November* 21, 1804. The vessel in question sailed on the 9th of *March* 1804, from *New York*, bound to *Curacoa*, and arriving off that island, was brought to by His Majesty's frigate *Blanche*, and warned of the then existing blockade; upon which the master directed his course to *Jamaica*, where he arrived on the 5th of *April*. On the 6th, he was sworn before the naval officer to a memorial, requesting the Governor's permission to enter the soap, candles, and cottons for exportation; but before the memorial was presented, the ship and goods were seized. On the 9th, an information was filed against the ship and cargo in the Vice Admiralty Court, pleading the statutes of 7 & 8 *Will. 3. c. 22.* 7 *Geo. 1. c. 21.* and 28 *Geo. 3. c. 6.*; and on the 19th, the master entered a claim, with an explanatory attestation, annexing thereto the memorial above-mentioned.

The Counsel for the Crown contended, 1st, that this was an importation within the meaning of the statutes; and 2dly, that the penalty attached to the vessel, and to all the goods on board. On the first point they argued, that it was a general principle that coming into a port with articles on board not having an ulterior destination,

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destination, was an importation of such articles; and that if such importation be prohibited by law, nothing short of absolute distress or compulsion could operate as a justification; that this was to be tried on the principles relative to deviation which had been laid down over and over again in blockade cases; and that in respect to revenue cases, the same principles had recently been applied in the *Eleanor, Hall*; that so far from any distress being shewn, every pretence set up by the master was evidently fraudulent, as, indeed, the whole of his conduct had appeared to be throughout; that he probably meant to break the blockade of *Curacoa*, having received information of its existence from two *English* cruizers five days before he fell in with the *Blanche*; that subsequently to such information, on being asked by his crew, "Where he would go to in case he could not enter *Curacoa*," he answered, "To *Jamaica*;" that he was, however, very well aware that the articles in question could not legally be imported into *Jamaica*, because he himself mentioned them to Captain *Mudge* of the *Blanche* as prohibited, although in his attestation to the claim he pretended to have been informed for the first time by his addressee in *Jamaica* that they were so; that he pretended to have been advised by Captain *Mudge* to go to *Jamaica*, whereas that gentleman (who had been examined) appeared to have left it to the master's own discretion to go thither or to the island of *St. Thomas*; that he had alleged no reason for not going to that island; that he might have gone thither or to the *Spanish* main; that his pretended want of water was disproved by the witnesses, who swore to his having three large casks of water on board, containing 400 gallons; and that on his arrival he had not even reported his vessel as in distress.

On the second point, the counsel cited the case of the *Experiment, Hathaway*, as conclusive, together with the statutes pleaded in the informations below.

For the Claimants it was submitted, on the first point, that no offence either intentional or actual was proved; that with respect to intention, it could not possibly exist in the minds of the owners who had dispatched their ship and property to *Curacoa*, and, it must be presumed, had suffered some disappointment and inconvenience in the vessel's not reaching her destined port; that this their primary object having been defeated by the interposition of a *British* force in support of a belligerent right, it would be hard to hold them strictly bound by the subsequent acts of the master, who, if left to his own conduct as their agent, would have terminated his

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voyage at *Curacoa*; that even if the master's conduct were to bind his owners, it was fully justified by the necessity of the case; that under the circumstances of being warned off from his original port of destination by a *British* frigate, it was not requisite to set up a case of the very last extremity of distress to justify his going into *Jamaica*; it was sufficient that he had made a fair choice among difficulties; that some difficulty could not be denied to have existed; he had a cargo of perishable articles, no island that he could reach but *St. Thomas's* and *Jamaica*; his vessel, a dull sailer, would have encountered much danger and difficulty in beating up to reach the former; his provisions and water (laid in only for a voyage to *Curacoa*) must necessarily be running short though not absolutely expended, and might have failed before he could reach *St. Thomas's*, though sufficient for the voyage to *Jamaica*. That as to the blockade, the master was not bound to take the vague information of vessels which he might casually meet, and which, if they had intended to give him that fair legal warning to which he was entitled, would have indorsed it as usual on his papers. That a vague expression used in conversation with his crew, in respect to an event merely contingent, was too slight to bear any inference whatever, especially as no other part of the discourse was in evidence; that the prohibited goods were openly set forth in his manifest, and his pointing them out to Captain *Mudge* was a proof of fairness; that Captain *Mudge* admitted he had "recommended *Jamaica*" as well as *St. Thomas's* to the master, and had even given him a letter to take to that island, evidently intimating his impression to be in favour of the choice which the *American* had made, and which must have been on a supposition, that under the circumstances, the prohibited articles would be treated with indulgence. That the manifest was open to the inspection of the boarding officer at *Port Royal*; that the master took it ashore to the general correspondent of the owner at *Kingston*, as was natural, to consult him on the subject; that the memorial advised by him openly stated the nature of the articles in question, and must have been seen by the Naval Officer; that the delay in presenting it to the Governor was accounted for by the official forms it was obliged to go through; that though the ship had been two or three days in port before it was seized, no attempt had been made to land any part of these articles, but, on the contrary, the previous steps taken by the master clearly negatived his having any such intention, and, indeed, would have rendered it impossible for him to effect it without discovery; and it was submitted, that when the circum-

stances

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stances clearly negatived the intention of landing, the presumption of law arising from the mere bringing within the port, fails. To shew that the law makes a plain distinction between bringing within a port, and importing into the body of a country, the language of several statutes was referred to, particularly of 4 Geo. 3. c. 15. s. 36. and 45 Geo. 3. c. 57. s. 13. A passage also was cited from *Reeves on Shipping*, p. 256.

On the second point it was urged, that if any penalty attached to this transaction, it could not extend at farthest beyond the confiscation of the ship and the prohibited articles. It was stated, that the learned Judge of the High Court of Admiralty had himself some doubt on this point; that the very language of the statutes pleaded and relied on by the seizer was in fair construction to be taken in the sense thus limited; and that, in the present case, the statute law must be taken in conjunction with the resolution or proclamation of the Governor in Council, which must now be considered as having all the force of law. The origin and effect of these proclamations was thus traced. Shortly after the *American* war, an intercourse took place between the United States of *America* and His Majesty's colonies in the *West Indies*, under sanction of certain Orders in Council, which were authorized by stat. 23 Geo. 3. c. 39. It became expedient, however, in times of emergency and distress, for the governors of the respective colonies to authorize a more extended importation of provisions than the King's Orders in Council allowed; and this expediency was formally recognized by law in the 27 Geo. 3. c. 7. since made permanent. The power of the Governors was, however, still restricted to importations in *British* ships; but they often found themselves obliged (from the danger of famine) to overstep this restriction, and to admit *American* vessels to import on the same terms as *British*. This practice was first adopted by Governors at their peril; but by 34 Geo. 3. c. 35. an indemnity was granted to them for all such proclamations, and frequent bills to a similar effect were afterwards passed until the 46 Geo. 3. c. 111. which declares, that all acts done by virtue of the King's permission to the Governors to this effect, shall be valid and legal, notwithstanding any former law or statute to the contrary.

But it appeared in the present case, that the resolution of the Governor in Council had been in virtue of the King's permission, and had placed *American* vessels importing provisions on the same footing as *British* vessels; and by the 28 Geo. 3. c. 6. *British* vessels importing provisions and prohibited articles would incur a forfeiture
only

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only of the vessels and prohibited articles ; the penalty, therefore, in the present case, could not extend to the provisions, they being protected by the proclamation, which must now be considered not only as legal in itself, but as giving legality to all acts done under its allowance and authority.

The Court was of opinion, that there was no doubt as to the fact of importation ; that by the proclamation of the Governor in Council, confirmed by 46 Geo. 3. c. 3. *American* vessels importing provisions were placed on the same footing as *British* vessels ; and that therefore the only question was as to the extent of the penalty under the 28 Geo. 3. c. 6. considering this as a *British* vessel ; that by the words in the first section of that statute, “no goods or
“ commodities whatever shall be imported or brought from any
“ of the territories belonging to the said United States of *America*
“ into any of His Majesty’s *West India* island, &c. under the pain
“ of the forfeiture thereof, and also of the ship or vessel in which
“ the same shall be so imported or brought, together with all her
“ guns, furniture, ammunition, tackle, and apparel, except tobacco,
“ pitch, tar, &c. &c.” the forfeiture, in the case of a *British* ship, would extend only to the ship and the non-excepted articles ; and that as this vessel was placed on the same footing by the proclamation, it must be subjected to the same penalty. *The Court* therefore affirmed the condemnation of the ship and prohibited articles, reversed the condemnation of the cargo, and restored the same.

R E P O R T S

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

&c. &c. &c.

(Instance Court.)

MARIA, KILSTROM.

Nov. 27th,
1809.

THIS was a question arising upon the salvage of a *Swedish* ship, which had been abandoned at sea by her crew under circumstances of great distress, and was taken possession of by two fishing smacks, the *Perseverance* and the *Ceres*, with the intention of carrying her into the port of *Harwich*. After they had taken the wreck in tow His Majesty's gun-brig *Mariner* came up, and having sent ropes and people on board, continued towing her jointly with the fishing smacks for some time; but the commander of the *Mariner* afterwards directed the fishing smacks to be cast off, as the gun-brig alone was sufficient for the purpose; and, the wind having the next morning shifted to the north-west, he resolved to proceed with the wreck to the first port he could fetch to the westward. The *Perseverance* and the *Ceres* continued in company until they arrived off *Dover*, and actually assisted in warping the vessel into that harbour, although, after they were cast off they had

Salvage—interference of a third party not justifiable where the salvage is already in the act of performance and under means sufficient for the purpose.

been

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been prevented by the people belonging to the *Mariner* from interfering any further in the service of towing her. On the part of the *Mariner* it was alledged, that when Lieut. *Griffiths* intimated his intention of taking the wreck in tow, no objection was made by the people belonging to the fishing smacks; that they would have been much longer in performing the service; and that if the *Mariner* had not been present they would either have been captured or obliged to quit the wreck, in consequence of the near approach of a *French* privateer on the second day.

JUDGMENT.

Sir *William Scott*.—This is clearly a case of salvage and of derelict, as it appears that the ship had been totally abandoned, and was rescued from danger by some of the parties appearing in this cause. At the same time it is not a salvage service of any very transcendent merit, arising from considerations of special danger or difficulty attendant upon its execution, and therefore the salvors will not be entitled to the highest recompense which, in some of these cases, the Court is inclined to allow. There was no immediate peril; the weather was moderate, and it appears that little actual exertion was necessary beyond the mere labour of towing the vessel, which is of no great bulk, only 48 tons, and having on board a cargo of a very buoyant nature.—The principal question therefore is, to which of these parties the Court shall decree the salvage: It appears that these two fishing smacks, the *Perseverance* and the *Ceres*, being at sea for the purpose of fishing, something which had the appearance of a wreck was discovered at a distance: the *Perseverance* immediately stood towards the object, which

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which proved to be this vessel, and, having got possession, proceeded to take her in tow. The *Ceres* came up about an hour afterwards, and proffered her assistance, which was accepted, and from that time both the smacks were employed in one common service of towing the wreck. Two hours after this, up comes the *Mariner* gun-brig, dispossesses the fishing smacks, and now claims to be considered not only as salvor, but as principal salvor, by the Court. The question of merit or of demerit on her part must depend upon a preliminary question, which is, whether her assistance was wanted or not; because the character of the act must be determined by the necessity of this interference. If there was no such necessity, it will be a case rather of demerit than of merit; a salvor who is in possession has a lien, a qualified property in the thing saved; and it may be extremely injurious, not only to his interests, but to those of the owners themselves, that he should be put out of possession, and his reward disputed or interfered with by others, until the matter can be adjusted in a Court of Justice. If these two smacks, which had the vessel in tow, were sufficient for the purpose, in what way can the gun-brig be considered as a salvor? The salvage was already in the act of performance, and under means apparently sufficient. That a party should lie by as an indifferent spectator, without offering any assistance to a vessel in distress, and then, when others are in the very act of executing the service, should be permitted to come in and say, I am a salvor in this case, is not to be endured; not only does it introduce new and vexatious claims against the owners, but it may prevent those who are justly entitled to reward from receiving an adequate share. In the present case

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it is expressly denied, on the part of the fishing smacks, that they were in any want of assistance from the gun-brig; and therefore it remains for me to consider what is the evidence produced on the other side in support of that averment. Now I must own that it appears to me very inadequate to sustain the claim which is advanced by this King's ship: it is said by *Annis*, the pilot of the *Mariner*, "that the master of " the *Perseverance* intimated that he had been a fortnight at sea, fishing out of sight of land, and in consequence was unable to tell correctly where he then " was, and enquired of the deponent the bearings and " distance from the land." That certainly is not enough to entitle the informants to a salvage; they were bound to communicate such information; it was not more an act of humanity than of duty, and what the master of the fishing smack had a right to expect from any vessel that he might have fallen in with. Lieutenant *Griffiths* then goes on to state, "that considering the ship " to be ninety miles from *Harwich*, the nearest *British* " port, and, conceiving the *Perseverance* and her crew " in possession to be insufficient to conduct her into a " port of safety, he intimated to the master of the " fishing smack, that he should take her in tow." But, in point of fact, the other smack was also contributing her assistance, and there is nothing to shew that they were not together sufficient for the purpose to be effected; Mr. *Griffiths*, indeed, says that they were not sufficient; but he has not stated the grounds upon which he formed that opinion; and when it is expressly averred, on the other side, that no such assistance was required, I cannot take his opinion absolutely; he should have put the Court in possession of his reasons for so thinking, in order that it might judge

of their sufficiency. Because it is not enough that this gentleman himself entertained a sincere persuasion that the fishing vessels were unequal to the task they had undertaken, the Court also must be satisfied that he entertained that opinion upon sufficient grounds. Another ground for the claim set up by the gun-brig is founded upon a sort of military service; it is said, that a cruizer of the enemy made her appearance, and would have captured the vessel, had she not been deterred by the presence of the *Mariner*; but this happened on the second day, and in a place to which the vessel might not have been brought; if she had been left in the hands of the people belonging to the fishing smacks, as it was their intention to carry her direct into *Harwich*; so that if the enemy's cruizer was driven off by the gun-brig, it is to be recollected that the danger itself would, probably, not have arisen if the vessel had not been brought into that situation by the determination of Lieutenant *Griffiths* to pursue another course. Upon the whole of the circumstances I am under the necessity of considering the claim of the *Mariner* as of the weakest kind; her commander may at the same time, have acted under an impression that his interference was necessary; and therefore I shall allow two-fifths of the whole value to be divided between the two fishing smacks, after deducting the expences, and fifty guineas to the crew of the gun-brig.

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Nov. 25th,
1809.

SANTA ANNA, LARRINAGO.

Spanish property
—the owners
being resident in
a part of *Spain*
subject to the
control of the
French—restored
under the Order
in Council 4th
July 1808.

THIS was the case of a *Spanish* ship and cargo, which was captured 21st *August* 1809, by the private ship of war *John Bull*, on a voyage from *Montrico* to *Cadiz*; with an ostensible destination to *St. Andero*.

On the part of the Captors it was contended—That the parties on whose behalf the claim was given were resident in that part of *Spain* which was under the dominion of the *French*, and consequently that they had not a *persona standi* in the *British* Court of Admiralty. That supposing them to be entitled to restitution as *Spanish* subjects under the order of the 4th *July*; yet they were *Spanish* subjects who in this instance were carrying on a traitorous intercourse with the enemy, for whose use these stores must be presumed to be going, as the *French* army was in possession of *St. Andero*. That it was to be expected that the witnesses examined in preparatory should wish to dissemble that destination, and therefore little reliance could be placed on their testimony. That as to the documentary evidence it was inconsistent with itself; for although the bills of lading and letters of consignment pointed to *Cadiz*, yet there was a certificate on board from the municipal officer at *Montrico*, declaring the actual destination to be *St. Andero*; and as the master had sworn that all his papers were true and genuine, they were all equally entitled to belief. The Court therefore would rather infer a destination to *St. Andero*, from the smallness of the vessel and the improbability

improbability that she should have been permitted to put to sea with a cargo adapted to military purposes, unless the *French* had been well assured that it was with the intention of proceeding to some *Spanish* port in their possession, in which case the ship and cargo would also be subject to confiscation, under the Order in Council prohibiting vessels to trade between ports, from both of which the *British* flag is excluded.

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7th Jan. 1807.

On the part of the Claimants it was argued—That the vessel actually stood towards the privateer for protection the moment she discovered her to be a *British* cruizer. That the witnesses in preparatory all declared that their destination was to *Cadiz*, and that their representation of the fact was corroborated by every document on board, except the certificate from the municipal officer of *Montrico*, which it was necessary to obtain in order to enable the ship to clear out: and that as to the smallness of the vessel, it was notorious that the greater part of the coasting trade of *Spain* was carried on from one extremity of the country to the other in vessels of precisely that description.

JUDGMENT.

Sir *William Scott*.—I think it is clearly the intention of the Government of this country, publicly expressed, that all *Spanish* property should be treated with the utmost possible tenderness. The Order in Council of the 4th *July* 1808, declares that “all *hostilities* against “*Spain*, on the part of His Majesty, shall immediately “cease;” here, then, is a total extinction of hostilities proclaimed, without any exception or limitation whatever: In the third and fourth articles of the same Order it is provided, “that all ships and vessels belonging to

Appendix F

The
SANTA ANNA.

Nov. 25th,
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“ *Spain* shall have free admission into the ports of His
 “ Majesty’s dominions, as before the present hostili-
 “ ties; and that all ships and vessels belonging to
 “ *Spain*, which shall be met with by any of His Ma-
 “ jesty’s ships and cruizers, shall be treated in the
 “ same manner as the ships of States in amity with
 “ His Majesty;” here, again, is no restrictive dis-
 tinction of particular parts of *Spain*, but peace and
 amity are proclaimed generally with that country, in
 exactly the same terms as would have been employed
 in a definitive treaty. Under these public declarations
 of the State, establishing this general peace and amity,
 I do not know that it would be in the power of this
 Court to condemn *Spanish* property, though belong-
 ing to persons resident in those parts of *Spain* which
 are at the present moment under *French* control, ex-
 cept under such circumstances as would justify the
 confiscation of neutral property. The Order in
 Council appears to be framed under the impression,
 that the general disposition of the inhabitants is friendly
 to this country, and that this disposition is only over-
 ruled by the effect of *French* force in particular dis-
 tricts. In the cases of the property of such persons
 taken, the Court would, I think, be at most inclined
 to suspend its judgment for the present, under the
 authority of this general declaration, and wait till
 some more precise rule was framed by proper autho-
 rity, or till length of time and duration of *French* pos-
 session furnished a rule that might apply to such cases,
 though not specifically distinguished in the terms of
 the Order. In the present case I see no sufficient rea-
 son for an unfavourable hesitation of judgment. The
 vessel is, I think, proved to be going to *Cadiz*, the
 port of our allies, with an useful cargo on board, a
 cargo

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cargo of military stores ; there is nothing to contradict this destination, excepting a single document, a paper of mere form, granted by the constituted authorities, as they are called, at *Montrico*, in which a destination to *St. Andero*, then in *French* possession, is held out. It is impossible to attach much weight to that, because such a paper must have been accepted on board any vessel sailing from the port which this ship had quitted, as a cargo of such a description would not have been licensed to depart for *Cadiz* by those who alone had the authority to grant passports. All the witnesses depose to the destination to *Cadiz* ; the letters on board are addressed to persons there, and the fact that this vessel stood towards the *British* privateer for protection, the moment her character was ascertained, strengthens the presumption. The evidence, therefore, of a destination to *Cadiz* strongly preponderates ; and taking the fact to be so, what is this case, but that of subjects of a country with which a general amity had been proclaimed, serving the common cause of the allied countries, by carrying military stores to one of the strongholds occupied on behalf of that cause, from a port happening to be subject to the prevalence of *French* arms in its immediate neighbourhood. Be the residence of the parties what it may, (for it does not very distinctly appear,) I can have no hesitation in restoring property so employed to persons manifesting such dispositions.

April 12th,
1810

SPECULATION, KOHT.

JUDGMENT.

Trade between
Prussian ports
illegal under the
Order in Council
7th Jan. 1807.

Appendix G.

SIR William Scott.—This is the case of a *Prussian* ship and cargo, captured on a voyage from *Stettin* to *Koningsburg*, both *Prussian* ports; and I am of opinion that, under the Order in Council prohibiting vessels to trade between ports from which the *British* flag is excluded, this voyage is illegal. It is true that, by a subsequent Order in Council, of the 25th November 1807, *Prussian* ships are permitted to trade between neutral port and neutral port; but I think this Order is controlled as well by its own import as by the former Order of the 7th of January, so far as respects the trade from one *Prussian* port to another, from both of which the *British* flag is now excluded. Because ports so interdicted to the commerce of this country, in compliance with the wishes and policy of the enemy, cannot be brought within the description of ports strictly neutral, though the country of which they form a part may not be at war with this country, and may have a general character of neutrality. The ports themselves are in effect hostile; they derive a character of hostility from the exclusion of the *British* flag, in the same manner, and under the same penalties of prohibition, as would be applied in ports directly hostile. A part of this cargo, it has been suggested, is entitled to peculiar consideration, as it is represented to be the property of the King of *Prussia* himself; and certainly, if it could be shewn that these were articles going for the private accommodation of the sovereign, it

it would be proper, (conformably to that comity which is observed in such cases by Courts of Prize,) to restore it; but in this instance, the property in question consists of a considerable quantity of salt, evidently not intended for the private consumption of the sovereign, but for the purposes of trade or revenue, and therefore it cannot be so favourably distinguished.—Ship and cargo condemned.

The
SPECULATION.

April 12th,
1810.

L'ACTIF, LORRIAL.

Jan. 23d,
1810.

THIS was a *British* prize vessel, which had been recaptured from the *French*, and the question was, whether the former *British* owners were entitled to restitution on salvage under the circumstances of the case. It appeared that at the time when the recapture took place the ship was sailing under *French* colours, as a merchant vessel, on a voyage from *L'Orient* to *Nantes*, with a cargo of sugar, cotton, and other goods. She had no commission of war, nor any arms except a few muskets for self-defence; but an affidavit was made by the mate, who deposed that she had cruized as a *French* privateer for two months against the commerce of this country; and there was also a register of this ship as a *French* merchant vessel on board, in which it was recited that she had formerly been fitted out as a privateer at *Rachelle*. On these grounds it was submitted, that the *British* claimants were barred from restitution under the exceptive clause of the prize act.

British prize vessel having been fitted out as a privateer by the enemy, although navigating as a merchant vessel at the time of recapture, not restored to the former *British* owner.

JUDGE,

L'ACTIF.

JUDGMENT.

 Jan. 23d,
1810.

45 Geo. 3. c. 72.

Sir *William Scott*.—The question in this case turns upon the interpretation of a clause in the Prize Act; the words of which are undoubtedly very large, for it provides that “if such ship or vessel so taken shall appear to have been, after the taking by His Majesty’s enemies, by them set forth as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors, but shall in all cases, whether retaken by any of His Majesty’s ships or by any privateer, be adjudged lawful prize for the benefit of the captors.” Here, then, is a rule as broad and universal as can well be laid down, and the terms in which it is expressed are such, that if this Court were disposed to escape from its conditions, it would find it very difficult to furnish any sufficient apology for so doing. In the act itself, no policy is pointed out for the foundation of the rule, but it is laid down in general terms, and in the past tense. It is, however, agreed on all hands, that this particular clause was intended by the Legislature as a stimulus to exertion proportioned to the danger of the undertaking, and therefore it has been argued that it is confined to vessels which are actually under commission when retaken. Now it is not without its use, in the interpretation of this statute to consider what was the original state of the existing law upon this subject. The rule of that law was, that where a ship was taken and carried *infra præsidia*, and especially after a sentence of condemnation, the ship became the property of the captor, and, if retaken, the former owner had no *jus postliminii*; and this continued to be the general law of *Europe* down to a very late period. This country, as a commercial country, has departed from it, and has made a new and peculiar

liar law for itself, in favour of merchant property recaptured, introducing a policy not then adopted by other countries, and differing from its own more antient practice. A rule of policy so introduced must still be considered as an exception from the general law, and is to be interpreted, where any doubt arises, with a leaning to that general law which is no farther to be departed from than is expressed. By the terms of this clause, vessels are excepted which “shall appear” to *have been* set forth for war.” The policy of this exception is not expressed, but it amounts, I think, to a declaration, that the more lenient rule adopted by this country does not apply to a case attended with the present circumstances; and unless it can be proved, that, in enacting this clause, the Legislature had nothing else in view but to encourage the attack of armed vessels, it cannot be allowable for this Court to assume that such was the sole policy of the act, to the effect of confining its operation to that single case. I think it more probable, that where the former character of a vessel had been once obliterated by her conversion into a ship of war, the Legislature meant to look no further. From that moment the title of the former owner, and his claim to restitution, were entirely extinguished, and could not be revived again by any subsequent variation of the character of the vessel. His title being once gone, is gone for ever; the words of the Act of Parliament are broad and general, and in a retrospective form, and I feel it difficult to retreat from the obligations they impose upon me. At the same time, as this is a new case, I shall allow the claimants their expences.

L'ACTIF.

Jan. 23d,
1810.

Dec. 9th,
1809.

BYFIELD, FORSTER.

Breach of blockade—sale of cargo in the blockaded port by compulsion.

Appendix †.

THIS *American* ship was captured on a voyage from *Copenhagen* to *Liverpool*, and proceeded against for a breach of the blockade. It appeared from the evidence of the master, that the ship had sailed on her former voyage from *Boston*, destined to *Gottenburg* for information and in pursuit of a market; but on her arrival off the *Naze* of *Norway* she had been captured by a *Danish* privateer, and on the 14th *July* was carried into *Christianfand*. After two months delay the master obtained his liberation, and sailed for *St. Petersburg*; but coming to an anchor off *Copenhagen*, he was there detained, and compelled by the Government to land and sell his cargo: after which he obtained permission to take on board the present cargo on account of his owners for *Liverpool*. A claim was given for the ship and cargo, as protected by His Majesty's licence, which was not exhibited; but among the ship's papers there was an Order in Council, dated *August* 24th, authorizing the grant of a licence to certain *British* merchants, permitting a vessel bearing any flag, except the *French*, to proceed with a cargo of permitted goods, from any port in the *Baltic* to any port in the United Kingdom.

JUDGMENT.

Sir *William Scott*.—The evidence which is furnished in this case shews that the conduct of the master, in going with his ship to *Copenhagen*, was perfectly voluntary. The account which he gives is, “that the ship
“ was

was captured on her voyage from *Boston* to *Gottenburg*, and carried into *Christiansand*; after a delay of two months, he obtained restitution, and sailed for *Petersburgh*, but that, having come to an anchor at *Copenhagen*, he was there compelled to sell his cargo." I must observe, in the first place, that having gone voluntarily, and without necessity, to *Copenhagen*, he had already violated the blockade; the act was entirely his own; and the subsequent force, if applied at all, was only to compel him to dispose of his cargo. Now, as to this subsequent compulsion, if proved, cannot be taken as exempting him from the penalties of the offence already committed by him; because such a doctrine would put it in the power of the enemy to break off in part, at least, the effect of a blockade, and, by a pretended exercise of authority, to rehabilitate the vessel, and enable her to sail out again in ballast, in the very face of the blockading force, after she had deposited her cargo. Here, however, the blockade was violated by a second act, which was also admitted to have been voluntary. The mateys, "that after the former cargo was discharged, the master went on shore, and petitioned the Government for permission to take in another cargo in the blockaded port." It is no excuse to say, that this cargo was intended to be brought to this country; the ship was as no more at liberty to break the blockade for such purpose, than for any other. Then it has been shown out, that here is an Order of Council for a licence to import from the *Baltic*; but the licence itself is not forthcoming, neither would it have furnished any protection to the case, because at the time the Order bears date, the ship was lying at *Christiansand*, when, according to the representation of the claimants,

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claimants, there was no intention of disposing of the former cargo at *Copenhagen*; and therefore it could not be of a nature to protect the purchase of a fresh cargo in that port, a transaction which was not in contemplation when the application to the Council Office was made. A licence, expressed in general terms, to authorize a ship to sail from any port with a cargo, will not authorize her to sail from a *blockaded* port with a cargo taken in there;—to exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the licence; otherwise a blockaded port shall be taken as an exception to the general description in the licence.—Ship and cargo condemned.

Jan. 19th,
1810.

LUNA, SOUTHWORTH.

Order in Council,
26th April, 1809,
not held to extend to places temporarily under the dominion of the enemy.
Appendix H.

THIS ship, under *American* colours, was captured on a voyage from *New York* to *St. Sebastian's*; there was no question as to the property; but upon the fact of destination it was urged on behalf of the captors, that the Order of the 26th April 1809, imposing a blockade on all ports and places under the government of *France*, together with the colonies, plantations, and settlements in the possession of that government, must be construed to extend to the port of *St. Sebastian's*, as it was notorious that the *French* had been in complete possession of the place for nearly two years. That upon any other construction of the Order in Council, the blockade would be rendered wholly abortive, as it was nugatory to prohibit vessels from carrying

carrying their cargoes into the ports of *France*, if they were permitted to have free access to ports situated immediately upon the *French* boundary, and in the actual possession of the *French* armies.

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LUNA.

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JUDGMENT.

Sir *William Scott*.—I can have no doubt that this ship and cargo ought to be restored, for certainly it is not within the power of this Court to extend the operation of the blockade beyond the limits which the Public Authority has assigned to it. I cannot admit that, because the port of *St. Sebastian's* borders on ports which are blockaded, that therefore it is less accessible than any other open port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent. When the Order of the 26th of *April* was limited to the ports of *France* and *Holland*, and their colonies, and to certain parts of the newly-constituted kingdom of *Italy*, it was intended to operate on those places, and no other; certainly not upon those which might be thrown temporarily under the fluctuating dominion of *France*. The ship and cargo must be restored; but the question is, upon the expences which have been incurred in consequence of the detention. It is impossible for the Court to throw out of its consideration; that when these Orders in Council are issued, it is the duty of the Officers of His Majesty's navy to carry them into effect; and although they may be of a nature to require a great deal of attentive consideration, gentlemen of the navy are called upon to act with promptitude, and to construe them as well as they can under the circumstances of cases suddenly arising. With every wish, therefore, to make the
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nothing upon the face of the depositions to support the suggestion that the *American* master, after he had purchased the vessel, did not intend to carry her to a *British* port. He then proceeds to state, that “Lieutenant *Keenan* came on board, and made enquiry for the master of the vessel; when the deponent related to him all the circumstances which had attended the vessel, and informed him that he had been the master, but he did not then know what he was.” Now, although this person was at a loss how to describe himself, after the purchase of the vessel by the *American* master, the legal relation will be the same. He says further, “that the *American* master, happening to return on board soon after, Lieutenant *Keenan* demanded from him the ship’s papers, which he accordingly delivered up; and on the following day Lieutenant *Keenan* took out the *American* crew, and possessed himself of the vessel.” The same account is given by the other witnesses, and I think it results from this evidence, that there was nothing that was otherwise than meritorious in Lieutenant *Keenan*’s taking the controul of the vessel under the peculiar circumstances of the case. That merit, however, will not make him a recaptor; the ship is clearly not taken out of the hands of the enemy, though the measure he adopted might in some degree contribute to the security of the vessel. The account of the manner in which the *Henry* was purchased by the *American* master, is contained more particularly in the affidavits of three gentlemen, who were passengers in the *John and Edward*: they state, that “in the month of *October* last they agreed with *John Byers Burger*, the master of the ship *John and Edward*, for their passage from *London* to *New York*

“an—

“ and having embarked, with several other passengers,
 “ all *British* subjects, they continued to prosecute
 “ their voyage until the 26th day of the same month,
 “ when they were captured by the *French* privateer
 “ *La Decide*; that they were taken on board the pri-
 “ vateer, and remained there about forty hours, when
 “ the privateer fell in with and captured the brig
 “ *Henry*. That shortly after the brig was taken, the
 “ captain of the privateer offered to sell her to *Burger*
 “ for eleven thousand dollars, which he refused to
 “ give; upon which the captain of the privateer said
 “ he would burn the brig; and after a treaty, which
 “ was carried on for some time between *Burger* and
 “ the captain of the privateer, and Mr. *Kerr*, the
 “ supercargo of the *Henry*, *Burger*, with the appro-
 “ bation of *Kerr*, agreed to give nine hundred pounds
 “ for the brig, and to secure the same by his bills on
 “ *London*; of which sum *Kerr* then agreed to secure
 “ two hundred pounds to *Burger* on his arrival in
 “ *London*. That on the bills for that sum being so
 “ given, the captain of the privateer put *Burger* into
 “ possession of the *Henry* and her papers, and imme-
 “ diately sent *Burger*, together with the appearers,
 “ and *Hannay* and *Kerr*, on board the brig, with
 “ permission to *Burger* to proceed in her to such port
 “ as he should think proper.” Now this has been
 represented as if it were an illegal transaction; and
 certainly if the *American* master had purchased the
 vessel upon his own account, it would be so; as he
 could derive no title from the captors without a pre-
 vious sentence of condemnation. But if it was merely
 a transaction by which, under the form and colour of
 a sale, he was to recover the property for the owners,
 he has rendered them a very meritorious service, and

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is justly entitled to a salvage. It is not necessary that the recovery of the property should be attended with personal risk to the salvor; in cases where the enemy makes a present of a captured vessel to a stranger, who has encountered no hazard, who has not endangered a hair of his head, or laid out a sixpence of his money, the Court has always held the party entitled to a salvage if he has been the instrument of bringing the vessel back to the possession of its owner. Now if by this pretended sale the ship, which was otherwise consigned to destruction, has been recovered, it is surely not for the owner to quarrel with the transaction, and at the same time to take the benefit of it. Risk is not necessary to found a claim of salvage; if it were so, it cannot be denied that the vessel has been brought in safety to an *English* port, and restored to the hands of its owners, at the risk of this person's purse, and perhaps at the risk of his personal liberty, because, for any thing that I know to the contrary, these bills might be put in suit against him on his return to *America*, and he might finally become answerable for them. Well, but it is said, here was no intention to give the vessel up to her owners, or to bring her into a *British* port: now every particle of the evidence, which I shall presently notice, except the affidavits of *Tooke*, a passenger, and of two seamen of the *Henry*, points to an intention on the part of the *American* master of coming to this country. The original purpose of the *American* master was to run the ship into *Milford Haven*, which is certainly a very proper port, and from whence he could with great facility have had communication with her owners; but it happened that the weather proving unfavourable, the ship was driven into *Crookhaven*, and, on the sixth day after her arrival there, she was seized by Lieutenant

Keenan.

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Kesnan. Here, then, is the overt act, which is sufficient evidence of the intention of the *American* master to bring her to a *British* port; and it affords no presumption against the fairness of his intentions, that he did not throw up the ship, which was his only security, immediately on his arrival at *Crookhaven*. In the short interval that elapsed between his arrival there and the seizure of the vessel, he might have had no sufficient opportunity of opening a communication with her owners, or of obtaining proper advice with respect to the mode in which he was to proceed: for he had clearly a right to make his own indemnification a matter of negotiation. The averment which is contained in the affidavits of *Tooke* and of the two seamen, “that *Burger* threatened to carry them into a *French* port, unless they would consent to give him two hundred pounds,” I take it to be perfectly fabulous; it is so repugnant to all rational belief, that I think the sooner that affidavit retires from observation the better; if such had been the fact, it would certainly have come out in the depositions and the affidavits of the three other passengers, who, however, appear to know nothing of it. Then what is there to diminish the merit of this salvage, which has been effected under the colour of a sale, though no real sale took place. The property has been rescued from destruction, and brought to a *British* port, which certainly would not have been done if this *American* master had intended to run away with the ship. It is a clear case of salvage, and the *American* master must be protected against the bills drawn by him for the payment of the *French* captor. I shall therefore give him three hundred pounds over and above the amount of these bills, which, reckoning the property at three thousand pounds, will be one-seventh of the remainder.

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ENTRY.

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der. To the King's ship I shall allow thirty pounds, with the expences, as it must be admitted that the vessel came into the port in *Ireland* under very anomalous and suspicious circumstances.

Feb. 14th,
1810.

ELIZABETH, NOWELL.

Blockade—
breach of—ex-
cuse insufficient.

THIS was the case of an *American* vessel bound on a voyage from *Baltimore*, ostensibly to *Tonningen*, and captured for a breach of the blockade of the *Emu*. The excuse set up by the master was, that he had been informed by a *British* cruizer that he should not be able to get a pilot at *Heligoland* to carry him on to *Tonningen*; that the anchorage in that roadstead was insecure at that season of the year; that his crew were exhausted with fatigue; and that the vessel was in distress, as he had lost his mate, and the binnacle compass had been washed overboard.

On the part of the Captors it was contended—That the determination of the master to proceed to the *Emu* was evidently not the result of the causes alledged by him; and that supposing the fact to be so, they did not constitute such a case of necessity as would justify him in proceeding to a blockaded port.

JUDGMENT.

Sir *William Scott*.—This ship and cargo are claimed as the property of the same owner, who is resident in *America*. The master is the consignee of the owner, and certainly has a large discretion as to the port which he

he is to select for the disposal of his cargo ; although in the instructions *Tonningen* is pointed out primarily as the port of his destination. The fact, however, is, that the ship is captured in the river *Ems*, and, as I understand the journal, with a pilot on board for *Emden*. Now *Emden* was clearly an interdicted port, under the Order of the 26th of April 1809, the date of which excludes all pretence of ignorance, when compared with the date of this adventure. It is said, that the late Order of the 17th of *May*, explanatory of the blockade of the *Ems*, renders the former equivocal ; but in what manner it applies to the present case is not attempted to be shewn ; the master himself pleads ignorance of the blockade ; but he pleads ignorance generally, not at all founding it upon any misapprehension of the Order of the 17th of *May*. He seems to have been unacquainted with the latter Order, and consequently could not have been misled by it ; the argument, therefore, which has been raised upon this circumstance, may safely be laid aside. The difficulty, then, which the master has to explain is, by what means it has come to pass that, with a destination to *Tonningen* he is found to be not only not going there, but actually in an interdicted place. This is a strong fact, and requires to be accompanied by a strong explanation. The account he gives is this : “ That on the 22d day of *December* the “ ship’s course was altered to the river *Ems*, by reason of this deponent having been informed on that “ day, by an officer belonging to His *Britannic* Majesty’s sloop of war *Mesquito*, that several *American* “ vessels were riding at anchor at *Heligoland*, without “ being able to procure pilots for *Tonningen*, as the “ *Danes* made prisoners of all pilots going with ships “ to

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Appendix I.

Appendix K.

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“ to that port : and that an *American* ship, called the
 “ *Edward Pribble*, of *New York*, had been lost in
 “ going in without a pilot : that this deponent was
 “ also induced to alter the ship’s course, as above
 “ stated, by reason of his mate having been washed
 “ overboard, and his ship’s crew being fatigued and
 “ worn out by bad weather, which rendered it im-
 “ prudent to proceed with his vessel to *Heligoland*,
 “ where the anchorage in the winter season is very
 “ bad.” Now the fact is, that he is not informed
 that that *American* ship was lost in going into *Ton-*
ningen, which was the port of his destination, because
 his entry in his log is, that the ship was lost going
 into the *Elbe* ; here is, therefore, an important varia-
 tion in his own account of an occurrence which he
 expects the Court to receive as a reason for his going
 to the *Ems*. The principal point, however, upon
 which he relies is, “ that a number of *American* ships
 “ were riding at anchor at *Heligoland*, for want of
 “ pilots to go to *Tonningen*.” But it does not appear
 that any representation was made by him to the officer
 of the *Mosquito*, that he should be under the necessity
 on that account of shaping his course for the *Ems* :
 if he had, I presume the answer would have been,
 “ You must go to *Heligoland*, as the other *Americans*
 “ have done ; what is there to privilege your vessel
 “ more than any other ? If you do not choose to go
 “ to *Heligoland*, there are other ports in the neigh-
 “ bourhood ; but you cannot make your inability to
 “ get a pilot an excuse for going into a blockaded
 “ port, which would be an excuse quite as valid for
 “ all the other *American* vessels, as they are waiting
 “ to get pilots.” Another fact on which he relies to
 distinguish his case from others is, that the binnacle
 and

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and compass had been washed overboard. The entry in the log, on the 24th, is this, “ saw two sail, which
“ proved to be two galliots, bound into *Emden*,
“ which we spoke, and got a man out of one of them
“ to pilot the brig into harbour; she is in distress for
“ a harbour, having lost the mate, and binnacle and
“ compass overboard; and the people much fatigued,
“ and not able to do duty.” Now it appears that for two days he continued steering perfectly well without the binnacle compass; and if it was lost, the probability is, that he had another on board: at all events, being so near the land, he could have been under no difficulty in getting to *Heligoland*, which is a straight course, and where he certainly might have obtained another. Well, but then it is said, he had lost his mate: that, however, had happened some days before, and I must suppose that the master was himself qualified to navigate the vessel entrusted to his care. Then again it is said, that the crew were exhausted: now this is a fact which must have been equally well known to every witness on board; it was as obvious to the lowest man in the ship as to the master himself, and yet none of them speak of it: one of the witnesses says, “ the *only* reason for the
“ said ship’s course being so altered was, that the
“ master was informed by the officer of the *Mosquito*
“ that there were no pilots to be had at *Heligoland*.” I have looked back into the log for four or five days preceding this period, and find that the course of the vessel was as uninterrupted and as placid as possible; there is nothing that could have put the men in the condition here represented, and I must, therefore, take this to be a false representation *in toto*. All the reasons, then, which the *American* master has given for

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for not putting his ship in the same situation as others, fail. Then it is said, that at *Heligoland* there was only a roadsted, but the anchorage ground at *Heligoland* was not worse for him than for the other ships which were lying there; it is not pretended that his anchors and cables were in any manner defective; and even if such had been the fact, still he would have to account for his going to an interdicted port, when others were open to him. The presumption that there was an original intention to violate the blockade of the *Ems* is not at all repelled by the mere circumstance of there being letters for *Tonningen* on board the vessel: they would easily find their way to that place from *Emden*. Besides, as the ostensible destination would of course be held out in the *American* port of shipment as the real destination, persons resident in *America* might very naturally be induced to send their letters to *Tonningen* by this ship. Upon any view which I am enabled to take of the circumstances of this case, I am fully satisfied that the reasons offered by the master for carrying his vessel into the *Ems*, are not founded in truth; and if they had been so, I could not have considered them as amounting to a justification of his conduct.—Ship and cargo condemned.

Feb. 23d,
1810.

ARTHUR, RATHBURN.

Blockade—
breach of—ex-
cuse, that the ship
went in to procure
a pilot for an-
other port, insuf-
ficient.

THIS was the case of an *American* ship bound from *Providence*, ostensibly to *Heppens*, and captured near the *King's Buoy* in the *Ems*, which river the master stated himself to have entered for the purpose of procuring a pilot for the *Yadhe*.

JUDG-

JUDGMENT.

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1810.

Sir *William Scott*.—This *American* ship, with a valuable cargo on board, was seized on the ground of a breach of the blockade of the *Ems*. I need not say, that it is at all times an unpleasant part of the duty of this Court to enforce the rules of blockade, which, though founded in strict justice, are necessarily harsh in their operation. At the same time the Court feels it to be a part of its duty, which it must conscientiously and strictly discharge, without departing from those rules which have been already laid down as necessary for the support of this belligerent right. In this case the fact is not denied, that the ship was taken in a port which is blockaded, and therefore the whole burthen of exonerating himself from the penal consequences lies upon the party. He must shew that he was led there by some accident which he could not control, or by some want of information which he could not obtain. In doing this, he must prove his whole case, and, however innocent his intentions may have been, he must explain his conduct in a way consistent not only with the innocence of himself and of his owner, but he must bring it within those principles which the Court has found it necessary to lay down for the protection of this belligerent right of this country, and without which no blockade can ever be maintained. The facts in this case are contained in the evidence in preparatory, and in the letters found on board. By the letters it appears, that there was a very strong inclination on the part of the owners that the cargo should be delivered at *Emden*, if it should turn out to be an open and permitted port; and the same inclination is very strongly expressed in the instructions which are given to the master, as the laws

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laws of his conduct. The instructions are in these words: "Should you hear on your passage that the
" *British* Orders are rescinded, and the ports of *Holland*
" open to our trade, you may go to the *Texel*;
" otherwise, instead of going to the port of clearance,
" you are to proceed to the *Ems*; a passage into
" which river, to the eastward of the island of *Juist*,
" is left open by the *British* Order in Council of 17th
" *May*. Should the whole of the *Ems* be blockaded
" specially, you are to proceed to the *Yadbe*, which
" river will undoubtedly be left free. Whether you
" arrive in the river *Yadbe*, or at either of the other
" places, we request you to make immediate inquiry
" for Mr. *Samuel Greene*, who went in our ship *Robert Hale*, and was to remain in *Europe* to transact
" the business of one or two vessels for our account.
" By our last accounts he was at *Rustcrziel*, on the
" *Yadbe*; but on your arrival we think he may be at
" *Emden* or *Amsterdam*." This being the case, it
should by all means have been expressed in the open
papers, that the intention was that the ship should
proceed to the *Texel* or to the *Ems*, if permitted to do
so: these were primarily her ports of destination, and
ought not to be dissembled, otherwise the belligerent
may be deceived, and his rights eluded. I must ob-
serve also, that a preference so distinctly expressed is
not very consistent with the account given by the
master, that his destination was to the *Yadbe*; on this,
however, I shall not lay much stress, because it is
open to the answer which has been suggested by
counsel, that upon receiving information of the block-
ade of the *Ems*, that which was before only a con-
tingent destination, became definitive. However, in
point of fact, he is found in an interdicted place, and
he

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he must account for his being in such a situation most satisfactorily. In answer to the third interrogatory, the master admits that he met His Majesty's ship *Desiree* off the *Texel*, and was then informed that the *Ems* was blockaded, except one passage, through which it was physically impossible for him to pass; so that, if he was in any doubt of the fact before, that doubt was entirely removed. How he got so near to the *Texel* does not clearly appear: but, however, "there," he says, "he was informed by the commander of the *Desiree*, that if he would go to the island of *Borkum*, he would be sure to get a pilot for the *Tadbe*." He says "that he lay at anchor off *Borkum* during the night, where he did not succeed in getting a pilot, but was informed by a boat (of what description is not stated), that if he went up the *Ems* he would there get a pilot for the *Tadbe*; and that he accordingly weighed anchor and proceeded up the *Ems*." On this I must observe, that the small craft of the enemy was the very worst source to which he could refer himself for information; any intelligence received from such a quarter, on such a subject, is liable to great suspicion, and could afford no ground of justification. In his answer to the twenty-ninth interrogatory, he speaks in pretty much the same language; he says, "that failing in his endeavours to procure a pilot at *Borkum*, he went up the eastern *Ems* for that purpose." Now, in the first place, the fact that such was his real errand to the *Ems* is justly liable to great doubt, because it is surely not in the usual course of things that a pilot of one river should station himself in the navigation of another. Still less is it to be expected that a pilot, whose bread depends upon employment, should be found plying in an interdicted river, where

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where little or no trade was carrying on, and especially when it is to be expected that there would be a constant concourse of vessels elsewhere. If, however, this *American* master had received such information from the *Dutch* boat, it is strange he should not perceive the probable fallacy of it; but supposing this information to have been not improbable, was he at liberty to act upon it in the manner which he did? I am of opinion he was not: if he had any such expectation, it was not his business to run his ship so many leagues up the river: he might have sent his boat to the man of war to enquire whether a pilot for the *Yadbe* could be obtained there; and if the fact turned out to be so, there certainly could be no necessity for the ship to go up for the pilot, who might without difficulty have been brought down in the boat. He was not at liberty for any such purpose to place his ship on a forbidden spot, whither he had been told he was not to go; and therefore I think he did not proceed to act upon the information given by the *Dutch* boat in a lawful manner, if any such was given. I do not see how it can be more permissible to go up to a blockading squadron to enquire for a pilot, than to procure information relative to the blockade itself. Of the two, it seems less venial, because in that case the fact of an actual knowledge of the blockade is admitted; in the latter there is at least the possibility of ignorance. I am clearly of opinion that, upon the principles already laid down by this Court, and from which, however harshly they may operate in individual cases, it cannot recede without a total abandonment of belligerent rights respecting blockade; this ship and cargo must be condemned.

MENTOR, WILLIAMS.

March 6th,
1810.

THIS was the case of an *American* ship, from *New York*, bound ostensibly to *St. Sebastian's* in *Spain*, or to some other permitted port in that country. On the part of the captors it was suggested, that she was captured in a situation inconsistent with such a destination, and the question was referred to *Trinity Masters* for their opinion. It was admitted by the master, that he had deviated from his true course; but he stated in excuse, that his course was altered on the appearance of the frigate by which he was pursued and taken, as he had received orders from his employers not to speak any vessel during the voyage.

Sir William Scott.—Gentlemen, I will not trouble you with many observations upon this case, as it is so entirely involved in nautical considerations, that I must hope rather to derive information from your experience, than to communicate any in return. The question for you to decide is, whether this ship was really going to *St. Sebastian's*; because, if you should be of opinion that such was not her real destination, I am afraid the legal conclusion will be, that the port of her real destination which is dissembled in her papers, is so dissembled because it is one which could not safely be disclosed. All the papers, with the exception of one, certainly hold out a destination to *St. Sebastian's*; but still, as it is possible that such documents may be fabricated, the fact of navigation must overpower the result that would arise from the mere consideration of the papers them-

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MENTOR.

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1810.

themselves. The objections which have in this case been made to the sincerity of the destination, are founded not so much upon the conduct of the ship after she had seen the *English* frigate, which she purposely avoided, as upon her conduct during the whole course of her voyage. I am very well aware, that the *Atlantic* is a wide sea, and that in crossing it a ship may be carried widely out of her due course; in such a voyage variations may easily occur, and such as are perfectly consistent with a fair case. In ordinary times, I presume, a ship proceeding on such a voyage would make Cape *Ortegá*, and even in these disturbed times Cape *Ortegá* is a very desirable point to make, particularly with the wind to the southward, as it would bring the ship to a situation where she would be likely to meet with protection from the *English* cruizers; it does turn out, however, that this ship is found very much to the northward of that point of land. On these observations, gentlemen, I must submit the nautical question to your judgment: but I wish also to say a few words upon the instructions which were given to the master by his employers, *directing him not to speak to any British cruizer*. If these directions are to be taken in their full extent, as authorizing the masters of *American* ships to fly from *British* cruizers, it is a practice which, I venture to say, will be attended with very great inconvenience to *American* navigation. It must be understood, that every commissioned cruizer has an undoubted right of enquiry, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion, might be as penal as to resist it by force, though it has not been so held in practice; but certainly it is conduct which is always

to

to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties, in any matter requiring explanation of their conduct. It has, however, been argued, that the owners were justified in giving these instructions, on the ground that this was necessary, in order to avoid the consequences of the *French* decrees, imposing the penalty of confiscation on neutral vessels which have submitted to search by *British* cruizers. But if neutrals are to relieve themselves from the injustice of one belligerent nation, by committing a fraud upon the other, they are virtually countenancing and giving effect to those decrees which have been set up in opposition to the right of search. And therefore, wherever a deviation has been produced by circumstances of that kind, I do not say it will subject the vessel to condemnation, but it certainly cannot be admitted as an excuse for any such irregularity, such instructions ought not to be given; not only do they operate most injuriously to the interests of this country, by defeating the right of search, but they afford also a colour for a vessel to be found out of her proper course. If the act of submitting to search is to subject neutral vessels to confiscation by the enemy, the parties must look to that enemy, whose the injustice is, for redress; but they are not to shelter themselves by committing a fraud upon the undoubted rights of the other country.

Trinity-Masters were clearly of opinion that this vessel was not pursuing her course for *St. Sebastian's*, and the ship and cargo were consequently condemned.

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PROGRESS, BARKER.

Question respecting salvage on ships recaptured from the *French* at *Oporto* by the allied *British* and *Portuguese* army under Lord *Wellington*.—Salvage not given on *Portuguese* property; on *British* without distinction as to those cargoes which had been re-landed and warehoused by the enemy; value to be estimated at the port of restitution; on freight, where it is already in the course of being carried.

JUDGMENT.

SIR William Scott.—There can be no doubt that the recovery of this property at *Oporto* was in itself highly meritorious, but it does not necessarily follow that the mere fact of recapture, though meritorious, will found a legal claim of salvage. The Court must be upon its guard against admitting a construction of law, which would lead to very extensive consequences; and that too in a case which certainly presents itself to the Court with a novel aspect; for I do not recollect any instance in which an army, taking possession of a port and town, has applied to this Court for salvage on the vessels within that port recaptured. Usually such recaptures have been the result of a conjoint operation of the army and navy. It does not at present appear in this case in what manner the navy contributed to effect this service; that is a matter which is not yet sufficiently in evidence; I may, however, now express my opinion generally, that under possible circumstances the army alone might be considered as recaptors, and might be entitled to sustain a claim of salvage in this court for service done without the co-operation of the naval force. I think I may consider it as decided in fact, that the *French* had captured these ships, and were actually in possession of them; it is not necessary to shew that they had taken formal possession of each individual ship, because they had possession of the port itself; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves.

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selves. It is likewise clear in point of principle, that it is not necessary that it should be primarily the intention of the captor to recover the property. It might not be in his immediate contemplation, perhaps not even within his knowledge; and yet, if the service is performed, if the recovery of the property is the immediate and necessary result of what he has done, he will be entitled to salvage. I am also strongly inclined to think, that those parts of the cargoes which were relanded by the *French* will be subjected to salvage, because it was property taken away *jure belli*, and the hand of the enemy was still upon it. I cannot think the continuity of its character as cargo, is dissolved by the mere act of relanding it: it was not delivered over by the enemy to the civil possession of the shippers; it was not relanded by the owners, but was deposited in warehouses by the enemy, as property seized on board these vessels, and as such it was again put on board when it was recaptured. The case of the *Ooster Eems*, which has been cited, was very different; there the goods were relanded by the owners themselves, and had never been made prize of by the enemy. On these points, therefore, I should have little doubt: but there are others on which I must have further information before I can determine how far the recovery of the property, on the part of the army, can be considered as a recapture. This Court cannot go the length of giving a salvage interest in all cases in which a sea-port may happen to return to the possession of its rightful sovereign, and the property lying there restored to its rightful owners in consequence of a successful battle. In the *West Indies* an attack upon an island may very properly be considered as a general and combined attack on all the

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ports of the island ; the possession of the island and of its harbours is the immediate object in contemplation ; but it cannot be so said of every battle fought upon the Continent of *Europe*, although it may consequentially induce the enemy to abandon sea-port towns of which he had possessed himself. The *French* may be driven out of *Spain* by a single battle, and yet in such a case it could never be held that salvage was due on all the ships in all the ports of *Spain* ; there must be some limitation. The facts at present are differently represented, and therefore the Court must have the official account of the operations of the army, in order to see how the claim falls within the limitations by which such claims ought to be restricted. I must have evidence to shew that the battle was fought for the reduction of *Oporto*, and that the operations in its neighbourhood were such as can be fairly considered as composing an attack upon the place. I do not mean a direct actual attack, but an attack directed to that object. I am not disposed to say that there must be an actual siege in order to sustain the claim ; that would be to pursue the principle with a degree of pedantic minuteness, in which the Court is by no means disposed to indulge. If the case should be brought within this statement, that the operations of the army were directed to that object, there would then be ground sufficient to connect the fact of the battle with the direct recapture of the place ; it can make no difference whether the operation is directed against the town itself, or whether it is conducted in any other manner calculated to produce the same result, according to the best judgments of the persons concerned.

JUDGE.

JUDGMENT RESUMED.

On the preceding day this cause came before the Court very imperfectly instructed with any evidence on which it could found a decision. The persons who were examined spoke with so little certainty as to the necessary facts, that it was almost questionable whether the *French* had ever taken possession of the property, so as to establish a case of recapture. But I thought that, under all the circumstances, there was sufficient to satisfy the Court that, although in some instances no actual possession had been taken, yet that the ships had been sufficiently reduced under the bodily possession of the *French* army to entitle them to be considered as captors. The next question is, whether the property was retaken from the enemy, and by what force; and upon this latter point, I am sorry to say, the case still remains in some degree of obscurity; for there is no evidence as to the part which the navy took in the recapture. I do not yet find what was the actual contribution of the navy towards effecting this service. Whether they were actually co-operating in blockading the harbour, or whether the men of war did not make their appearance till some time after the enemy had left the place, is not explained. I cannot take the general account that these ships were recaptured by the joint forces of the army and navy as evidence decisive of the fact, and therefore the case is left with this imperfection hanging to it; that it may be a perfectly novel case, for it does not occur to any recollection that I can summon to my own mind, that there has been any claim of salvage before this Court for the recapture of vessels in a maritime port by the army alone. All the cases that I can recollect were cases of joint service, but here there

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is no proof of co-operation, which is to be regretted ; for although I do not see upon what principle it can be contended universally, that the claim of the army is not sustainable, it is, at the same time, always desirable to relieve a case from the inconvenience of novelty as much as possible. I do not see why the claim of the army may not be established on principle, if it can be shewn that maritime property in a maritime town has been recovered by its efforts directed to that purpose. Because, upon principle, persons, not in any military capacity, but merely acting as private individuals, if they happened by any successful effort to rescue property from the enemy, would be entitled to salvage : and I do not see why the individuals composing an army should be placed in a worse situation. And, therefore, if this property should be restored, I do not think the circumstance of its being recovered merely by a land force would be sufficient to bar the claim of salvage, though it may be a new ingredient in the case. At the same time, the Court would think it necessary to circumscribe the extension of any principle dependent upon the operations of an army, for the extent to which it might be carried is startling ; if it could be held, that every application of force on land, however remote, should be made the foundation of a claim for salvage. Putting the case which I suggested on the former day, that Lord *Wellington*, by a general victory, should dispossess the enemy of the whole Peninsula, and cause him to evacuate all its maritime towns, it would surely not give a claim of salvage to him and his army on all the ships in the various maritime ports of *Spain* and *Portugal*, re-occupied in consequence of such victory. The only case, as it appears to me, in which a claim could be sustained, would be

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be where a siege had actually taken place, or at least where the liberation of the property was an immediate and direct consequence of military operations, directed in the vicinity, and with a view to that object. It is not necessary that those operations should be absolutely carried on against the walls of the town; it is sufficient if they take place in its vicinity, so as to have an immediate influence upon its surrender, and to be evidently connected, and almost identified with the reduction of the place. It may happen that the same object may be better accomplished by operations at some little distance, and if accomplished in that manner, the Court would not undertake to say that that was not a reduction of the place. It would be a narrowing of the principle with a sort of pedantic minuteness, inconsistent with liberal justice. The *onus*, therefore, which on the former day the Court threw upon the army, was to shew that its movements were identified with the reduction of *Oporto*. The Gazette is now brought in, together with the affidavits of Major-General *Murray* and Brigadier-General *Stewart*, two officers of high character, who were employed upon that service. As evidence, the Gazette certainly is not liable to objection, it is the authentic narrative of the proceedings of the army, received by Government from Lord *Wellington*, and communicated as such to the public. It was drawn up at the time with no views to self-interest, and must be understood to contain as accurate and disinterested an account, steering as widely from any imputation of improper bias, as can well be imagined. Now, in the Gazette the reduction of *Oporto* is stated to be the immediate object of the march from *Coimbra*. Undoubtedly there were ulterior objects in view; it was not at *Oporto* that the

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the career of this army, supposing it to be victorious, was to terminate; but it was one of the primary and most important objects of its march. It is stated, that when the army was known to be in motion, part of the enemy's forces quitted *Oporto*, and came out to meet the combined army. Two or three engagements took place; the last of which was fought in the immediate vicinity of *Oporto*. It is obvious, even from the Gazette account, that on the one side and the other the object of that battle was the possession of *Oporto*. If the battle was not *in urbe*, it was fought *circa urbem, et propter urbem*. But this conclusion is greatly fortified by the testimony of General *Stuart* and General *Murray*, who state in their affidavits, as a sequel to the Gazette, “ that the *British* army commenced its march from *Coimbra* on the 7th of *May*, “ for the purpose of offensive operations against the “ enemy, and, amongst other things, more especially to dispossess and expel the *French* from *Oporto*, “ the recapture and occupation of which place by the “ *British* army was considered as a point of military “ importance on the operations of the campaign; “ that the *British* army entered *Oporto*, and gained “ possession thereof by defeating and driving the “ enemy therefrom, and the action with the enemy “ was kept up and continued within the town of “ *Oporto*, and five guns were actually seized and “ taken possession of by the *British* troops in one of “ the principal streets, nearly in the centre of the “ town, the horses belonging to the guns, together with the chief part of their drivers and attendant artillerymen, having been first killed and “ destroyed by the *British*. That Lord *Wellington* having appointed Lieutenant-Colonel *Trant* “ Governor

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“ Governor or Military Commandant of the place,
 “ he, without loss of time, marched forward in pur-
 “ suit of the enemy.” So that here is a continuation
 of this battle in the very centre of the town : whether
 the *French* were there in force or not, whether they
 were many or few, it is clear that they were driven
 out by the *British* army ; and that by this means pos-
 session was recovered of these ships and cargoes. I
 observe that the dispatch which is inserted in the
 Gazette, bears date at *Oporto*, on this very day, and
 there certainly can be no doubt that the contest took
 place for the possession of the town, and that its re-
 occupation was the result of the battle ; and therefore,
 if the delivery of these vessels was a consequence of
 that re-occupation, the army has a right to be con-
 sidered as salvors.—Whether the *French* were on that
 same day driven out of the Fort of *St. John*, which
 commands the entrance of the river, or not, is imma-
 terial, because if the ships could not immediately leave
 the river, still they were in a place of security, and in
 a condition to be delivered up to their owners. The
 restraint on their sailing could only be of a temporary
 nature, as the *French* would not be inclined to linger
 long at the fort of *St. John*, after the capture of
Oporto. The only remaining question is, Whether
 the claim of salvage can be sustained for the property
 which had been relanded ? And I must here adhere
 to the opinion I expressed on a former day ; that the
 property which had been landed and warehoused by
 the enemy, where it remained to be reclaimed by the
 owners on the recapture of the place, and was again
 resumed by them, and returned on board as parts of
 the cargoes of these vessels, must be considered in
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every respect as if it never had been severed. It is clearly advantageous to the claimants, that it should be so considered, because, if the property ceased to be a part of these cargoes, it must then have become *French* property, and would be condemned as prize to the captors. In the case of the *Ooster Eems*, the property had been delivered out for the purposes of civil custody; these are goods which had been seized by the *French jure belli*; they still remained as part of these cargoes, and I see no reason to exempt them from any obligations to which the rest of the property is subject. As to the proportion of salvage which is to be given in this case, I am of opinion that it would not be proper, especially as it is a novel case, to pronounce for a higher salvage to the army than what the legislature has thought proper to prescribe in cases of recapture by the other branch of the public force, and therefore, in the one case as in the other, I shall pronounce for a salvage of one-eighth.

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JUDGMENT CONTINUED.

I have now to determine, in fact, *three* points, that were reserved in discussing the question of salvage arising on the property recaptured at *Oporto*. The *first* is, whether any salvage is due upon the *Portuguese* property; the *second*, whether the salvage is to be apportioned upon a valuation of the goods taken after their arrival here, or with reference to the value at the place where they were recaptured; and the *third*, whether a salvage is due on the freight of ships taken up in this country, and sent to *Oporto* to bring away these cargoes, which they have been enabled to do by the act of recapture. I understand that, in
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point of fact, the quantity of *Portuguese* property that was water-borne at the time when *Oporto* surrendered to the enemy, is very inconsiderable, and consequently there is but a very small portion of *Portuguese* interest before the Court. But the question is, in itself, of considerable importance, from its possible application to other cases that may arise, and therefore it is one which the Court is bound to consider with great attention. It has already been determined, that all the property in the river *Douro* had been in the possession of the enemy, and that it was recaptured in consequence of a battle fought in the immediate neighbourhood of *Oporto*, by the allied army under Lord *Wellington*. It has also been determined, that the battle, which was not remotely, but immediately, connected with the liberation of the city, would have the same effect as a regular siege, and that the property in the harbour must be considered as directly liberated by its successful result. I do not observe that any claim for salvage is set up by the *Portuguese* part of the allied army, but that it is entirely confined to the *British* troops. When the matter was argued, I ventured to suggest a case to the Counsel, that seemed proper for the purpose of putting the question in its simplest form, in order that it might afterwards be seen how far the general rule, when laid down, would be liable to be subverted or modified by additional circumstances. The case put was that of a native army rescuing a sea-port town of its own country from the possession of the enemy. For instance, if, by a misfortune, which it is to be hoped will never happen, the enemy should get possession of *London*, and be afterwards expelled by a *British* army, whether that army would be entitled to a salvage on water-borne property

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property in the port of *London*, recovered by its exertions. I am of opinion that it would not; the native army employed by the State, and paid by the State for the national defence, if its efforts were successful, would be the means of reinstating the Sovereign in his rights of sovereignty, and his subjects would be entitled to receive their property back as it stood before the irruption of the enemy. The whole would revert *instantly* to its former owners, and though the gratitude of individuals might induce them to offer something as a voluntary gift to the army, by whose exertions they had been so extensively benefited, yet there is nothing in the nature of the service that could found a claim of salvage. This is a position in which I am fortified by the general practice of mankind, and the practice of mankind forms one great branch of the law of nations; the history of the world has produced no instance, that I recollect, in which a claim of salvage for the rescue of a capital city by the native army has been made and allowed, and therefore on principle and on practice I am warranted in concluding that the claim would not be sustainable. Now that is the state of the transaction in its simplest form; but suppose allies to be co-operating with the native army in the recapture, would the introduction of that additional circumstance effect any alteration in the application of the *principle*? The army coming as allies, and associated with the native army, compose part of the same body, they are pursuing the same objects, and stand in every respect on the same footing, they would have the same rights, and nothing more; the proportion of force can make no difference. Suppose, for instance, one of the maritime towns of this country to be taken, and that the enemy is expelled

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pelled by a *Portuguese* force acting in conjunction with the *British* army. I cannot conceive that such an auxiliary force would possess any other rights, than those which attached to the native army with which it was associated. The whole together must be considered as one army in every respect wherever *British* property was concerned, and if the *British* army would not be entitled to salvage, the army of the allies could claim none. Whether this were the greater army or the less, is of little moment, as I do not think the *quantum* would make any difference in the application of the rule; it would acquire no more than what the other part of the army would acquire, and therefore if I am right in these principles *e converso*, a *British* army sent to *Portugal* would not be entitled, for it would possess the same rights as the *Portuguese* army with which it was acting, and the *Portuguese* sovereignty being restored, and the private property of the *Portuguese* resumed, it would be no more subject to any demand of salvage on the part of the allies, than of the native force. It may, perhaps, be thought to militate against this principle that I have pronounced for salvage on the *British* property at *Oporto*; but it appears to me that there is this material distinction, that the liberation of *British* property was not the immediate object for which the *British* force was sent to *Portugal*, the recovery of that by the *British* army was a mere casualty; and, therefore, it is subject to the same claim for salvage, as *British* property recaptured elsewhere by a *British* force; it is only the application of the ordinary rule between our own subjects. On the *Portuguese* property, I am, therefore, of opinion, that no salvage is due. The second question which I have to determine is, whether the valuation of the property recovered, is to be taken here,

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here, or at *Oporto*. And I confess, that on the first view of the subject, I was disposed to hold that the valuation ought to be made upon an estimate of the actual value of the property, at the time when it was rescued from the hands of the enemy; but upon further consideration of the words of the Act of Parliament, and the practice of this Court, I am of opinion that it is at the place of restitution that the value is to be fixed. If the captors permitted the masters of these vessels to take possession at *Oporto*, it was merely a private arrangement for the accommodation of the claimants, but the actual and legal restitution is that which the Court makes when it pronounces in favour of claim, after the property has been brought in for adjudication. When that is done according to the phraseology of all the Acts of Parliament, the captor is to receive one-eighth part of the true value of the goods *so to be restored*, and I think I should depart from the principle which the clause of the act has in view, if I were to admit the application of a different rule in this case, merely because the captors had, for mutual convenience, given up the possession of the vessels at *Oporto*, and had suffered them to be navigated home under the care of their crews. It must be supposed, that in suffering them to go away the captors made only a provisional restitution, subject to all rights, and upon an understanding that the valuation should be afterwards determined. The introduction of a different rule would be attended with this inconvenience, that the captors would be induced to bring the vessels themselves to the port of restitution, and to retain possession of them, subject to all the rights which captors have upon them, and with the probability of great inconvenience to the owners and their cargoes. At the same time,

time, when I say that the true rule is to take the valuation at the place of restitution it must be understood that the value is to be considered with reference to the moment of arrival in port; for most undoubtedly the captors can have no right to a salvage on any additional value which the cargo may acquire by the payment of duties and other incidental expences incurred afterwards. These are adventitious augmentations of the value, which must be deducted from the proportion which the captor is to receive and the registrar and merchants will attend to the distinction. The last question which I have to determine is, whether any and what salvage is due upon the freights of those vessels which had been chartered in this country under an agreement to proceed to *Oporto* in ballast, for the purpose of bringing home these cargoes of wine, and, in consequence of the re-capture, have been enabled to carry that purpose into effect. Now, it is clear, that a service has been rendered to the vessels so circumstanced, and it is a service which goes the length of putting them in a condition to recover their whole freights, which depended entirely upon their final arrival here. As to the freights of the vessels that were taken up at *Oporto*, no salvage is asked upon them, and certainly it could not have been contended that any would be due, as the voyage had not commenced. But these vessels, which had gone to *Oporto* from this country under a charter-party for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture; they had actually broke ground, as the phrase is, and had entered upon that adventure out of which their profits were to arise. While lying in the harbour of *Oporto* they

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they were in the course of earning their freights; they were *in itinere*, and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charter-party to proceed to her port of destination in ballast, and to receive her freight only upon her return, the Court is not in the habit of dividing the salvage. These, therefore, are the determinations I have come to; first, that no salvage is due on the *Portuguese* property; secondly, that the valuation is to be taken at the port of restitution *deductis deducendis*; and thirdly, that where a ship goes out under a charter-party for the voyage out and home, salvage is due upon the whole freight.

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MADISON, FROST.

Dispatches on board a neutral ship going from a hostile port to a Consul of the enemy, resident in a neutral country, not a ground of condemnation.

THIS *American* ship had been captured on her former voyage by a *French* privateer and carried into *Dieppe*, from whence, after obtaining her liberation, she was proceeding in *ballast* to *Baltimore*. The compulsion under which the vessel went into the blockaded port being sufficient to exempt her from the penalties of a breach of the blockade, the counsel for the captors now pressed for condemnation, on the ground that among the papers on board were some dispatches from the enemy's government, which the master had not delivered up. It was also objected, that there were eight passengers

passengers and a small quantity of antimony on board, and consequently that the vessel must be considered as coming out with a cargo.

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JUDGMENT.

Sir *William Scott*.—Proceedings have been instituted against this ship on various grounds, and, among others, on the ground that she had sailed from a blockaded port with a cargo and a number of passengers on board; but it appears, that the few articles which she carried do not deserve the name of a cargo, and the passengers are not of a description to affix any hostile character to the vessel conveying them. The only remaining objection to restitution is, that the ship was carrying dispatches from the government of the enemy to *America*; and the question is, in what manner this will operate upon the vessel. The Court, in several instances, has had occasion to consider the effect of carrying papers of a public nature, and according to the different circumstances of the cases themselves Its decisions have been governed. In some It has held, that the conveyance of dispatches for the enemy did affix an hostile character to the ship; in others, attended with circumstances of a different description, It has held that the conveyance of them was not of a criminal nature, and that though the vessel was justly subject to the inconvenience of seizure and detention, it was not liable to confiscation. I have now to consider to which of these two classes the present case is to be assigned. The papers themselves had been transmitted to His Majesty's Government, and an application has been made to the Secretary of State for information respecting their real character. The manner in which they came on board is stated by the master, who says, in an affidavit, "that he received them from

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a person who is employed under Mr. *Armstrong*, the *American* ambassador at *Paris*, and, that he understood, they came from him." Certainly, if these papers are really of a hostile and illegal nature, it is not in the power of the *American* ambassador to sanction them, or to protect the conveyance of them. This Court has held, in cases of convoy, that even the interposition of the sovereign of a neutral country will not take off the criminality of an illegal act; still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect. But the matter turns in this case upon the *character* of the papers, as far as Government has thought it proper to characterize them.—The answer from the Secretary of State's Office is, that No. 3, contains a dispatch from the *Danish* Government to the *Danish* Consul-General at *Philadelphia*; and, I think, I am to infer from this account, negatively, that all the other papers are of an innocent nature. Now, I am of opinion, that a communication from the *Danish* Government to its own Consul in *America*, does not necessarily imply any thing that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed; such communications must be supposed to have reference to the business of the Consul-General's Office, which is to maintain the commercial relations of *Denmark* with *America*. If such communications were interdicted, the functions of the official persons would cease altogether. It has been said, that this communication of the *Danish* Government, with one of its delegates in another country, through the medium of the *American* minister at *Paris*, is a matter in which the neutral government is not at liberty to interpose and carry on, and that the neutral government

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government is not to concert measures with the enemy, for the purpose of assisting in communications relating solely to his own commerce. But I take this to be a correspondence in which the *American* Government is itself interested. A *Danish* Consul-General in *America*, is not stationed there merely for the purpose of *Danish* trade, but of *Danish American* trade; his functions relate to the joint commerce in which the two countries are engaged, and the case, therefore, falls within the principle which has been laid down in the case of the *Caroline*, in regard to dispatches from the enemy to his ambassador resident in a neutral country. In the transmission of these papers *America* may have a concern, and an interest also; and, therefore, the case is not analogous to those in which neutral vessels have lent their services to convey dispatches between an enemy's colony and the mother country. Here there is no such departure from neutrality as to subject the vessel to confiscation; yet I cannot help observing, that the conveyance of papers of this description for the enemy, by *American* vessels, is a practice of which they would do well, for various reasons affecting their own safety and convenience, to be more abstemious in the indulgence than the observation of this Court enables it to say they are. In this case the favourable presumption arising from the papers is strengthened by the character of the person from whom they were received; for it is a presumption, which I am bound to maintain, that as the neutral master received these dispatches from the hands of the *American* minister, there is in that circumstance a guarantee of the innocence of his conduct. This case is clearly not of a nature to call for serious judicial animadversion, and I shall, therefore, restore the ship, giving the captors their expences.

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RAPID, FLEMING.

Dispatches from an agent of the enemy on board a neutral ship going from a neutral port to a port of the enemy;—plea of ignorance on the part of the neutral master—admitted.

THIS was the case of an *American* ship which was captured on her voyage from *New York* to *Tonningen*, on suspicion of an intention to push into the *Texel*. But the question of destination being abandoned by the captors, they now contended that the case came within the principle laid down by the Court in the case of the *Atalanta*, as it had been discovered, that among the papers given up by the master at the time of capture, there was a dispatch addressed to the *Dutch* colonial Minister at the *Hague*, under cover to a commercial house at *Tonningen*.

JUDGMENT.

Sir William Scott.—The question of destination being disposed of, I have now only to consider what will be the legal effect of carrying these dispatches; and as it appears that the practice of conveying papers of this description, for the enemy, prevails to a considerable extent, I must take occasion to remind the proprietors of neutral vessels, that wherever it is indulged without sufficient caution, they will inevitably subject themselves to very grievous inconveniences. I should certainly be extremely unwilling to incur the imputation of imposing any restrictions upon the correspondence which neutral nations are entitled to maintain with the enemy, or, as it was suggested in argument, to lay down a rule which would in effect deter masters of vessels from receiving on board any private letters, as they cannot know what they may contain. But it must be understood, that where a party, from want of

of proper caution, suffers dispatches to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. If he is taking his departure from a hostile port in a hostile country, and still more, if the letters which are brought to him are addressed to persons resident in an hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. On the other hand, it is to be observed, that where the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and, therefore, it may be proper to make some allowance for any imposition which may be practised upon him. But when a neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to aver his ignorance of a fact which, by due enquiry, he might have made himself acquainted with. The party in the present case has the benefit of the favourable distinction: these papers, with some others, were put on board in an envelope, addressed to a person at *Tonningen*, who was instructed to forward them to *Holland*, but of this the master swears he knew nothing. They turn out to be of a public nature, conveying intelligence of importance to the government of the enemy at the *Hague*; and they begin, I observe, with an assertion which I hope is not true: the writer says, “the letter and accompanying inclosures which I this day dispatch to his Excellency the minister of the colonies, *via Tonningen*, will, I

Q 4

“ expect,

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“ expect, be communicated to you. I trust my con-
 “ duct will be approved of by his Excellency, and
 “ that he will please explain himself, both with regard
 “ thereto as also respecting the contents of my letter
 “ to the Marshal *Daandels*. The surest mode of cor-
 “ respondence, is by way of *England*, or *Paris* through
 “ the channel of the *Dutch* Minister, as the *American*
 “ *Minister* will not refuse to inclose for him a letter
 “ to me in his *dispatches*.” This, I hope, is rashly
 and injuriously said; the Court cannot bring itself to
 believe, that the accredited minister of a country in
 amity with this would so far lend himself to the pur-
 poses of the enemy as to be the private instrument of
 conveying the dispatches of the enemy’s government
 to their agent. The papers in question come from a
 person who seems to be invested with something of a
 public character, though of a peculiar kind, and they
 are upon public business, but I do not know whether
 they come strictly within the definition of dispatches.
 The writer of them had been sent to *America* from
Batavia by the Governor, to beat up for volunteers
 among the *American* merchants, in the hope of
 inducing them to embark themselves in the trade of
 that settlement. How far he had been acknowledged
 by the *American* Government does not appear; from
 the contents of the papers themselves he seems to have
 been stationed in *America*, not by the Government of
Holland, but by the *Dutch* Governor of *Batavia*,
 rather as a commercial agent to drive a bargain with
 individuals, and to induce them to join in these specu-
 lations for the relief of the *Batavian* trade, than for
 any purposes of a more diplomatic nature. His com-
 mission was such, that it might exist without his being
 acknow-

acknowledged as a public accredited minister by the *American* Government, and therefore the claimant is, perhaps, entitled to the benefit of the distinction which has been taken, that these papers, though mischievous in their own nature, proceed from a person who is not clothed with any public official character. They came to the hands of this *American* master among a variety of other letters from private persons: they were concealed in an envelope, addressed to a private person, and were taken on board in a neutral country: these are circumstances which would rather induce the Court to consider this case as excepted from the general rule, which does not permit a neutral master, carrying dispatches for the enemy, to shelter himself under the plea of ignorance. In the present instance the *American* master denies all knowledge of the contents of these papers, and the benefit of that denial will extend to the cargo; it is not, therefore, a case in which the property is to be confiscated, although in this, as in every other instance in which the enemy's dispatches are found on board a vessel, he has justly subjected himself to all the inconveniencies of seizure and detention, and to all the expences of those judicial enquiries which they have occasioned.

The
RAPID.

Mar. 21st,
1814.

April 4th,
1810.

CONSTANTIA HARLESSEN, KNUDSON.

JUDGMENT.

Claim of the owners of cargo to deduct from freight decreed to the crown monies advanced to the master to enable him to prosecute his voyage.

SIR William Scott.—The question in this case is, whether the owners of the cargo are entitled to deduct from the freight which had been formerly decreed to the *Danish* master, and is now claimed by the Crown, a sum of money advanced to him under the following circumstances: It appears that the master, who had sailed from *Salon*, in *Spain*, with a cargo of brandy, for *Varel*, overshot the *Tadbe*, and got into *Arendahl*, the port of his owner, in *Norway*, under some plea of distress; he there caused the cargo to be landed, and the ship repaired, at a considerable expence, and wrote to the consignees of the cargo, stating that a general average had been incurred by damage at sea, which would reduce him to the necessity of taking up monies upon bottomree to enable him to proceed on the voyage. The consignees, who, I suppose, saw no other means of facilitating the passage of their cargo, finding that the money required by the master was less than his freight would amount to, authorized him to draw for the amount on Mr. *Hockmeyer*, of *Hamburg*. This was done upon a usage which, from the necessity of the case, I should have supposed to be customary among merchants, even if it had not been certified by affidavit. The nature of the advance is a little indeterminate at the time when it is made, as it cannot then be ascertained whether or not any average is due, and as freight is not earned until the conclusion of the voyage,

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voyage, the final settlement is very properly referred to that period; because, if it shall turn out that no average was due, or at least not to the extent of the money advanced, then either the whole or part is deducted from the freight on the arrival of the vessel. It is perfectly understood that the advance is made by the merchant looking to the freight, as his security for this money, let the case turn out as it may; if average is due, it is understood that it shall be considered as advanced for that purpose; if not, that the money shall be taken as an advance of freight. In the present case the ship, before she was divested of her neutral character, had been captured and brought to *Tarmouth*; and freight was decreed to the *Danish* master by this Court. But before the departure of the vessel *Danish* hostilities broke out, and the ship was again seized and condemned to the Crown, which then succeeded to all the rights of the *Danish* master against the cargo, and to all the obligations to which he had subjected himself, so far as they arise out of that identical transaction upon which his claim against the cargo is founded. There may be other rights and obligations arising out of foreign and remote transactions with which the Crown is not affected; and upon this principle bottomree bonds have been disallowed, either because they do not arise out of the individual transaction, or, if they do, because the obligation is contracted with third persons, and not between the owner of the ship and cargo. But the Crown is bound to take *cum onere*, though not *cum onere universali*; and as the owners of the ship and cargo were entitled to set off against each other all deductions arising out of this immediate transaction, the Crown, which succeeds to the rights of the neutral master

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master exactly in that proportion in which *he* would have possessed them, in accepting those rights is bound to make such deductions as the *Danish* master would have allowed if he had continued neutral. Then, what was the condition of the neutral master, in common justice and by the law merchant, as it has been certified to the Court? The merchant, who had advanced this money under an uncertainty whether it was ultimately to be considered as average or freight, had a right to consider it as an advance of freight, as soon as it became certain by the event that no average was due. The right of making the deduction could never have been made a question between the master and the owner of the cargo; and the voyage being now terminated, by capture, as entirely as if the ship had arrived at *Varel*, the Crown can claim no exemption from observing the same conduct. Where the Crown takes to itself the rights of one of the parties against the other, so far as they arise out of the individual transaction, I am of opinion, that it is to the same extent bound by the obligations of that party towards the other, and therefore, without breaking in upon the principle that the Crown is not to regard latent remote claims of third parties, arising on foreign transactions, I shall allow the money which had been advanced to be deducted from the freight.

LADY ANN, WARDELL.

May 24
1810.

JUDGMENT.

SIR *William Scott*.—This question arises on the admission of a defensive allegation offered on the part of the owners of this vessel, in opposition to a demand of wages by a mariner. The objection which has been taken is, that the master is not a competent witness, and consequently that the owners are not at liberty to plead the letters which they received from him, stating the arrival of the ship in the *West Indies*, and the desertion of the party who brings this suit. But I am not aware of any general objection to the competency of the master of a vessel as a witness in a suit for wages. The mariner has his election whether he will proceed against the owners, the master, or the ship; and in this case the proceedings being instituted against the owners, the master has no immediate interest in the suit, and therefore is not an incompetent witness by any rule with which I am acquainted, though it may certainly be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case.

Objection to the competency of the master as a witness in a suit for wages—over-ruled.

FORTUNA, BRASCH.

May 8th,
1840.

Breach of the
Order in Council
restricting trade
to Heligoland.

THIS was the case of a *Hamburg* ship which was captured on a voyage from that port to *Heligoland*, with a cargo of miscellaneous articles, and proceeded against for a breach of the Order in Council of the 31st *May* 1809, by which the trade to *Heligoland* is confined to *British* ships.

On behalf of the Claimants it was contended—That the ship and cargo were protected by a *British* licence, which was in the possession of the shipper, who was not on board, permitting a vessel, bearing any flag except the *French*, to proceed with a cargo from *Norden*, passing Eastward of the island of *Juist*, or from *Heligoland*, or any port eastward of the island of *Juist*, as far as the river *Eyder*, inclusive, to any port of this kingdom North of *Dover*. Subsequently to the capture the licence was endorsed for this vessel by the shipper.

JUDGMENT.

Sir *William Scott*.—This is a question respecting the importation of goods from *Hamburg* to *Heligoland*. The island, I observe, is not described in the Order in Council as a part of *the dominions of His Majesty*, but is spoken of only as being now in His Majesty's possession; and therefore it does not stand on the footing of a colony or an established settlement. This Order in Council is of a nature peculiar to the circumstances of the place; its provisions are not matter
of

The
FORTUNA.May 8th,
1810.

of municipal regulation, but rather of military and temporary direction, prescribing what the commerce of the place shall be, and the manner in which it is to be approached. Now, it certainly must have been intended that the Order should be operative; and how it is to be carried into effect without the application of the authority of this Court, I do not see. The jurisdiction of the Court of Exchequer would not, I presume, extend to a port so constituted; all that could be done without the assistance of the Prize Court would be, to prevent the landing of goods, by means of custom-house officers, if any are stationed there, which I can hardly suppose to be the case; but as to goods already brought on shore, they might, perhaps, be secure. I cannot, therefore, but think, that it was intended by His Majesty's Government that it should lie with this Court to give effect to the Order, and I am fortified in this opinion by the words of the last clause, in which "the Lords of the Admiralty, conjointly with the Lords of the Treasury, are required to give the necessary directions herein."

The provisions of the Order are exceedingly strong: "no foreign vessel (except as before excepted) shall enter into the port, harbour, or road, lying between the Island of *Heligoland* and *Sandy Island*, and the shoals of the said island, respectively, and commonly called or known by the names of the *North Haven* and the *South Haven*, under any pretence whatever." These are very unlimited expressions undoubtedly; but it goes on to provide that "no goods, wares, or merchandize whatsoever, shall be in any manner put on shore in any part of the said Island of *Heligoland*, from any such foreign vessel,

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“ vessel, or carried from the shore of such island to
 “ any such foreign vessel, or in any manner tranship-
 “ ped from any such foreign vessel into any vessel
 “ laying in the said harbour, port, or road; or from
 “ any vessel lying in the said harbour, port, or road,
 “ into any such foreign vessel.” Nothing can be
 more clear than that, under this Order, it is not law-
 ful for foreign vessels to go to *Heligoland* and tranship
 their cargoes, even into *British* ships; it is intended
 to exclude all access of foreign vessels, unless they
 come there under His Majesty’s special licence, or in
 ballast. Words cannot be more imperative than these,
 if this Court is the organ which is to carry the Order
 into execution. I feel great difficulty in saying that
 there is any thing in the licence which was not on
 board this vessel that can protect the case, I should be
 extremely glad to relieve the parties, if it were possible,
 but I do not see how I can escape out of the obligations
 which the Order in Council imposes on me.—Ship and
 cargo condemned.

COURTNEY, ENGLISH:

May 25th,
1810.

(Instance Court.)

THIS was a question arising on the admission of a libel offered on behalf of the mate and a seaman belonging to this ship, in a suit for subtraction of wages; a claim being made by them upon the master, under an act of the *American Congress*, for three months pay over and above the wages due to them, in consequence of their being discharged in this country. The libel pleaded the rate of wages and the terms of the voyage in the usual manner, and also the following extract from an Act of Congress, bearing date 28th February 1803, which was printed at the back of the mariner's contract, intituled, *An Act supplementary to the Act concerning Consuls and Vice Consuls, and for the Protection of American seamen*. “ And be it further
 “ enacted, That whenever a ship or vessel belonging to
 “ a citizen of the United States, shall be sold in a fo-
 “ reign country and her company discharged, or when
 “ a seaman or mariner, a citizen of the United States,
 “ shall, with his own consent, be discharged in a foreign
 “ country, it shall be the duty of the master or com-
 “ mander to pay the Consul, Vice-Consul, Commercial
 “ Agent, or Vice-Commercial Agent, for every seaman
 “ or mariner so discharged, three months pay over and
 “ above the wages which may then be due to such
 “ mariner or seaman; two thirds thereof to be paid
 “ by such Consul or Commercial Agent to each sea-
 “ man or mariner, so discharged, upon his engage-
 “ ment on board of any vessel to return to the United
 “ States,

Wages—Suit on
 behalf of *Ameri-*
can seamen
 serving on board
 an *American*
 ship.

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“ States, and the other remaining third to be retained
“ by him for the purpose of creating a fund for the
“ payment of the passages of seamen or mariners,
“ citizens of the United States, who may be desirous
“ of returning to the United States, and for the
“ maintenance of *American* seamen who may be desti-
“ tute and be in such foreign port.” The libel then
went on to plead, that by a circular Order to Consuls
of the United States it was directed, that “ all inci-
“ dents of a nature calling for judicial redress must
“ be submitted to the local authorities.” The libel
concluded with praying the Court to declare the
monthly wages to be due and payable, and also to
decree three months advance pay, over and above the
said wages, to be paid to *William Lyman* Esquire, Con-
sul General of the United States, resident in *London*,
to be by him applied pursuant to the said Act of
Congress.

JUDGMENT.

Sir *William Scott*.—This is the first case of the kind
which has been brought to the notice of the Court,
and I certainly feel great difficulty respecting the
admission of the libel. We know the language which
has been occasionally held in the Courts of Com-
mon Law with respect to the jurisdiction which this
Court exercises in cases of mariners’ wages. Suits for
wages, due to mariners of our own country, have been
said to be entertained by the Court of Admiralty, more
from a kind of toleration founded upon the general
convenience of the practice, than by any direct jurisdic-
tion properly belonging to it, although the exercise of
such a jurisdiction has existed from the first establish-
ment of such a Court. In various instances, in order
to

to prevent a failure of justice, this Court has gone a step further, and as wages are due by the general maritime law, however modified by the particular regulations of different countries, it has, with the consent of the accredited agent of their own Government, entertained proceedings for wages at the suit of foreign seamen, against foreign Vessels in which they have served, such vessels being in the ports of this kingdom. But here the other part of the claim does not arise out of the general maritime law, but merely out of a municipal law of the United States; and I should find great difficulty in considering this recital of the act of Congress as any part of the contract, as it is only printed on the back of the instrument, and is not at all referred to therein.—Court took time.

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COURTNEY.

May 25th,
1810.

On a subsequent day the Court said.—With respect to the wages, I am so far willing to entertain the suit with the consent of the representative of the United States; but I do not think I have jurisdiction to enforce a municipal regulation of that country: had I that power, I should be glad to do it in the present instance; but I think the probable effect of this Court entertaining it in its present form would be a prohibition. At the same time, it appears to me, that if the regulation were embodied in the contract, so as to compose a part of it, the Court might be impowered, in that case, to carry it into full effect as an article of the contract between the parties.

June 5th,
1810.

JOHAN AND SIEGMUND, NIEGEL.

(Instance Court.)

Possession, cause
of.—Suit not en-
tertained by the
Court in the case
of a foreign ship.

THIS was the case of a *Hamburg* ship which had been arrested in the port of *Plymouth* at the suit of *C. F. Grantoff* of *London*, merchant, as the lawful attorney of *C. Störzell* and others, all of *Hamburg*, and described as the owners of fifteen sixteenth shares of the ship in a cause of possession against the master, also of *Hamburg*, and owner of the remaining sixteenth part.

JUDGMENT.

Sir William Scott.—This is a cause of possession, at the suit of a number of persons, who hold fifteen sixteenth shares of this vessel, against the master, who is the owner of the remaining sixteenth. If this were a *British* ship, there can be no doubt that, by the practice of this Court, it would, upon the application of a majority of the parties interested, proceed to dispossess the master, though a part owner, without minutely considering the merits or demerits of his conduct. But I do not know of any instance in which the Court of Admiralty has entertained a suit of this nature, in the case of a foreign ship. The Court, with the consent of the parties and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium*; but this, I think, is a case which cannot be so considered, because whatever may have been

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JOHAN AND
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June 5th,
1810.

been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and, therefore, by entertaining this suit, I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those Courts to which they are directly and properly amenable. By the law of this country, as understood and applied by this Court, the majority of owners are entitled to the possession; it is not so by the law of some other countries; what may be the law of *Hamburgh* I cannot tell; but I might be guilty of great injustice if I were to take upon myself to apply the local regulations of this country to the case of a *Hamburgh* ship. By the law of *Hamburgh*, the master may have a paramount right, as owner in possession, or he may have a right to retain the possession as a security for his wages, or for the payment of accounts out-standing between him and the other owners; in short, there may be the greatest diversity in the law of different countries upon this subject. I am very sensible that great inconvenience may arise to the owners of foreign vessels from the want of a competent jurisdiction in the country where the ship happens to be; the master may be roving about from the port of one country to another, and it may be extremely difficult for the rest of the owners to pursue him with effect by any process that the Courts of his own country can furnish. It is difficult to suggest the remedy in such a case, but I am of opinion that the defect cannot be supplied by this Court, as the right of possession has not been left to depend upon the general maritime Law of Nations, but has been variously settled in the different maritime codes of different countries.

June 5th,
1810.

CORNELIA, ROOSE.

(Formerly the NAUTILUS of Sunderland.)

Prize Vessel, sale
of to Neutral
under a sentence
of condemnation
—former *British*
owner divested.

THIS ship, under *Prussian* colours, was captured on a voyage from *Boulogne* to *Varel* in ballast, with a *British* licence on board, and carried into the port of *Dover*.

The present question arose on a claim for restitution on salvage given on behalf of *Thomas Nicholson* of *Bishopswearmouth* as the former *British* owner; the vessel having been seized by the enemy upon the commencement of hostilities.

JUDGMENT.

Sir *William Scott*.—I think there is little doubt that the ship did originally belong to these *British* claimants; but the question is, whether under all the circumstances of the case, they are entitled to restitution. If at the time when this vessel was taken it was clearly in the possession of the enemy, they would have a right to receive their property again, whether there had been a sentence of condemnation or not; because such sentence operates nothing against the rights of the *British* owner. But if, under the authority of a sentence in the enemy's Court of Prize, there has been a sale of the vessel to a neutral, that sale, which transfers the property to the neutral purchaser, will bar the claim of the original *British* owners against the neutral holder. This ship, I observe, was seized in the harbour of *Boulogne* upon the breaking

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CORNELIAJune 5th,
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breaking out of the war, and there can be very little doubt that, prior to the sale, a sentence of condemnation had passed; the law is not at any time forward to presume any unnecessary departure from established modes of proceeding; and in this instance the presumption is strengthened by the length of time during which the vessel lay in the enemy's port. A sentence of condemnation was found on board the vessel, which has been exhibited, but it turns out that it refers to a ship called the *Adelaide* of *Quebec*; whereas this ship is called the *Nautilus* of *S Shields*. No doubt this is a startling circumstance, but I cannot undertake to say, that if it were possible to get at the whole of the history of the vessel, the circumstance might not be satisfactorily accounted for. Taking it, therefore, on the presumption that a sentence of condemnation has passed, is there any sufficient evidence of the fact of transfer? I think the circumstances are such as would very much leave it a case of further proof, if the neutral purchaser were now in the cause; because the principal point that arrested the attention of the Court was, the very little intercourse that had subsisted between the master and the asserted neutral owner. But further proof cannot in this instance be obtained, because any call that might be made upon the asserted purchaser at *Emden* would not be answered, as he has no further interest in the question, the licence not being of a nature to protect a voyage of this description. The Court, therefore, must look to the ostensible character of the vessel at the time of capture;—she is under the *Prussian* flag and pass; she has the insignia of *Prussian* property; and under the defect of evidence, which before would only have made it a case of further proof, I must consider it as

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CORNELIA.

June 5th,
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Prussian property. At the same time I think the former owner was justified in asserting his claim, and I shall allow him his expences, but the ship must be condemned to the captor, who succeeds in this case to all the rights of the neutral purchaser.

July 28th,
1810.

FRIENDS, CREIGHTON,

JUDGMENT.

Question as to
freight, the voy-
age not being
completed—
a moiety given.

SIR *William Scott*.—This was the case of a *British* vessel, which had been chartered at *Campeachy* for the purpose of delivering a cargo at *Lisbon*. The ship had successfully prosecuted her voyage to the very entrance of the *Tagus*, when she was warned off by the blockading squadron. Upon receiving this information she continued for some days with the fleet, but a gale of wind coming on which blew her out to sea, she was picked up by a *Spanish* privateer, and was soon afterwards retaken by a *British* cruizer, and carried to *Madeira*, where the ship and cargo were sold by the recaptors, to pay the salvage. A claim has since been given for the ship and cargo, which was decreed to be restored, and the Court has now to consider what freight is due under the circumstances of the case. On the part of the owner of the ship it is contended that the whole of the freight is due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo it is contended, that no freight is due, as the cargo was not delivered according to the terms of the charter-party. Several cases from the Courts of Common Law have been cited, but I con-

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FRIENDS.

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feels it does not appear to me that any principle is to be extracted from them that is applicable to the present question, although I should have thought that some cases of *British* ships which had come up to the very port of their destination, and were prevented from discharging their cargoes there, by the act of the sovereign authority of their own country, must have occurred in those Courts, among the multiplicity of cases which the present extended system of blockade has given rise to. In the case of the *American* ships bound to *France* or *Holland*, which were brought into the ports of this country under the prohibitory law, the full freight was pronounced to be due where the owners of the cargoes elected to sell here; where they did not elect to sell here the Court left it to them to settle the freight with the owners of the ships. The Court considered a voyage from *America* to this country very nearly the same in effect as a voyage to those contiguous countries to which those vessels were originally destined; in all probability the markets of this country were not less favourable than in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the owners of the cargo. In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Courts of Common Law, it could not say that the delivery at a port in *England* was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of
Common

The
FRIENDS.

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1810.

Common Law do to make contracts between parties; but as a Court exercising an equitable jurisdiction, It considers itself bound to provide as well as It can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction. The present case is marked with peculiar misfortune, because here, after the ship had been stopped by the blockading force, she was blown out to sea, and being subsequently taken out of the hands of the master, she was carried by the recaptors to a distant port, and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is, upon whom the weight of it shall fall; now if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is, that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other; I think, therefore, that what equity would suggest is, that the loss should be divided; and under these circumstances I shall direct a moiety of the freight to be paid.

COURIER, ERICK.

June 19th,
1810.

THIS ship had sailed on a destination from *Pillau* to *Colberg*, but the master in the course of the voyage entertaining doubts as to its legality, applied to the commander of a *British* cruizer, who gave him permission to proceed. It was contended on behalf of the claimants, that although this was a prohibited voyage under the Order of 7th January 1807; the permission given by a *British* officer was sufficient to entitle the case to a favourable distinction.

Breach of Order,
7th Jan.—Per-
mission given by
British officer to
proceed, not a
ground of pro-
tection.

JUDGMENT.

Sir *William Scott*.—So long as these Orders in Council exist, they are to be expounded and applied by this Court; and if they press with any unnecessary severity on the commerce of other countries, that may be matter very proper for the consideration of His Majesty's Government; but this Court must proceed upon general Rules of interpretation. The Order in Council prohibits neutral vessels to trade between ports from which the *British* flag is excluded: and under that authority this Court held that the trade between one *Prussian* port and another was illegal. If that interpretation was erroneous, it ought to have been corrected by an appeal to the superior Court, or if it was calculated to extend the restrictions of the Order beyond what was intended, it should have been represented to His Majesty's Government, for certainly, as the Order stands at present, it does appear to me to admit of no other interpretation.

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tation. The other conclusion at which the Court arrived was, that vessels are not to call for orders at an interdicted port ; and although that rule may press hard in particular cases, and perhaps in this, yet if vessels were suffered to touch at ports where they are not at liberty to trade, it would enervate the whole effect of the prohibition, because it would be impossible to devise any means by which they could be prevented from delivering their cargoes there. In this case there certainly do appear to be some circumstances which indicate an intention on the part of the master of coming on to this country after touching at *Colberg*, but the fact is, that, at the time of capture, the ship was actually going to a *Prussian* port. Then what is there to take the case out of this peril? Nothing. It is clear that in the original intention of the owners this cargo was to be sent on a prohibited voyage ; the master, after he had got to sea, became doubtful as to the propriety of proceeding, and made enquiry of a *British* cruizer, whose commander very improperly gave him a permission to go on. But it is not the mistaken exposition of this *British* officer that will alter the law of the case ; the Court has allowed misinformation upon a point of fact to be a fair ground of indulgence ; but upon a question of law the neutral is to look to other sources for instruction. In this case, indeed, the officer does not assume the right of interpreting the law, but he assumes a right which he is as little possessed of, that of superseding the Order in Council, by giving this vessel permission to go to the interdicted port. I do not say a case might not occur in which the Court would be disposed to hold an officer in His Majesty's service authorized to assume such a power, but it must be a case of necessity ;

necessity ; as for instance, where a ship is in absolute want of provisions, or is otherwise incapable of proceeding to an open port, and where the necessity alone without such permission given would be a sufficient justification. Now it is not pretended that this is such a case : all that the certificate of the British officer says, is, " I have permitted this vessel to proceed from *Pillau*, with her cargo to *Colberg*." Did he possess any authority to grant such permission, in the very face of an Order in Council ? It cannot be. I am very sorry that this conduct in the *British* officer has had the effect of misleading the master of the vessel, but, at all events, his owners have not been deceived ; theirs was the original purpose of sending the vessel to an interdicted port, and from which purpose *they* had never departed. At the same time it is not without some degree of pain that I condemn this ship and cargo, as proceeding to an interdicted port under an insufficient authority.

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CHARLOTTA, ELLIOT.

JUDGMENT.

Breach of block-
ade —alleged
distress—excuse
admitted.

SIR William Scott.—This case has already been before the Court once or twice, and I have now come to a determination to permit the attendance of Trinity Masters. It is the case of an *American* ship which was proceeding on a voyage from *Boston* to *Petersburgh*, and put into the *Texel* in distress. At the former hearing I was much inclined to hold that, although a vessel going into a blockaded port would be subject to condemnation, the legal presumption that she is going in there for the purposes of trade, was ousted by the fact of her being taken coming out *without having delivered her cargo*. But I think that the case, in the first instance, is fit for further enquiry, because if it shall turn out that the ship went in for the purpose only of getting repaired, and that the port of the *Texel* was a fair port to make, with reference to the alleged distress, the case will be entitled to be favourably considered. If, on the other hand, it should appear that there was no such necessity, the legal presumption will be, that she actually went in there for the fraudulent purpose of delivering her cargo : and it is not her having come out again without executing that purpose, owing to some unexpected change of circumstances that will entirely remove the illegality. At present the Court has no absolute constat that the vessel came out with the original cargo as it has not been inspected ; but supposing the fact to be that the cargo remains the same, but that she went in meaning to dispose of

it, and there found the rigour of the *French* decrees, or the disadvantages of the market to be such as to frustrate the intention, in that case, the delinquency of a fraudulent intention has actually been consummated, and the vessel would be subject to confiscation. I am, therefore, desirous to look a little further into the case, in order to know whether her going into the *Texel*, after passing by all the intermediate ports between the island of *Sylt* and that place, was a step which, under the circumstances alledged, ought naturally to have been taken. The Master states in his deposition, “that having passed the *Texel* and “made the island of *Sylt*, he was driven back by stress “of weather and compelled to put into port.” I think, therefore, that I see enough in the case to make it not improper to require the attendance of Trinity Masters, in order to ascertain how far the *Texel* was fairly a preferable port, under all the circumstances of the case. Certainly it is a port which ought not to have been resorted to unless under the clearest necessity.

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On a subsequent day—The *Trinity* Masters gave it as their opinion that the deviation was necessary, and that the *Texel* was fairly a preferable port, as the state of the wind made it impossible for the ship to proceed to *Gottenburgh*, and there were circumstances which made the ports in the neighbourhood of *Sylt* objectionable. This being a sufficient justification, the ship and cargo were ultimately restored.

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ACTEON, MASON.

JUDGMENT,

Salvage on *American* vessels recaptured from the *French*, not having certificates of origin on board.

Talbot v. the ship Amelia. 4 *Dallas*, p. 34.

SIR *William Scott*.—This is a case which involves the question whether these *American* ships and cargoes which were not proceeding to *French* ports are liable to pay salvage on recapture by *British* vessels out of the hands of the enemy. The principle to which this Court adheres is that no salvage is due where a service is not actually performed, or where loss was not highly probable. It has been contended by Dr. *Dodson* that salvage is due upon *American* property on a principle of reciprocity, and a case has been cited by him from *Dallas's* reports of cases adjudged in the Courts of the United States of *America*, for the purpose of shewing that it is the practice of those tribunals to decree salvage on neutral property rescued from the possession of *French* captors. It was the case of a *Hamburg* ship which had been captured in the course of a voyage from *Calcutta* to the port of her owners by a *French* national corvette, and was afterwards retaken by a ship of war belonging to the United States, and carried to *New York*. By a decree of the Supreme Court at *Washington* the ship and cargo were restored to the neutral claimant, on payment of one sixth part of the net value for salvage; and from this it seems at first sight as if the *Americans* considered the rescue even of a neutral vessel, from the possession of a *French* captor, as a sufficient ground for salvage. But I think it is open to this explanation, that the case went not upon the general principle, but upon the irregular administration

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ministration of maritime law in the *French* Courts of Admiralty at that time, by which a vessel once in the hands of a *French* captor, whether neutral or not, would be in danger of confiscation. I cannot therefore take this case as furnishing a rule on which this Court can rely for giving salvage on *American* property rescued from the possession of the *French* on any principle of reciprocal justice. In the early part of the last war the Court held, that though *America* was not in a state of actual and entire warfare with *France*, yet that *American* property recaptured was subject to salvage, on the ground that such was the rapacity of the enemy that no vessel had a chance of being liberated from their Courts of Prize under their known disregard to all neutral claims. In that state of qualified hostility, (for war had not been declared by *France* against *America*) the demand of salvage was very readily submitted to by the *Americans*, and the service of recapture thankfully acknowledged. Upon the breaking out of the present war an expectation was entertained that the *French* Courts of Admiralty would revert to the genuine principles of maritime law, and, therefore, this Court did not give salvage on the recapture of *American* property. But if this expectation was cherished for a short time, it soon became notorious that the *French* Government had long since rendered it abortive. *France* has fulminated her decrees against the commerce of the whole world, and has even compelled this country defensively to have resort to measures which abstractedly and originally would be unjust in the highest degree. In the present case the ground assigned by the captor for the claim of salvage is, that there are no certificates of origin on board this vessel, and much discussion has taken place upon the question, whether or not this requisition

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quisition was confined to ships navigating to the ports of *France*. Certainly, looking to the terms of the original decree, it would seem that it was so confined ; but it has been understood in practice to apply to all commerce, and it is clear that it has been so understood by *America* herself, for many ships of that country have been brought in, on board of which these certificates have been found, though they were destined to neutral ports. In the exposition which this country gives of the *French* Decrees in its Orders in Council, it is evident that his Majesty's Government is persuaded that they are invariably required, whatever be the ports to which they may be destined. Amidst the fluctuating and capricious practice of the Prize Courts of *France*, it is difficult to say with any degree of confidence, whether the requisition extends to vessels destined to neutral ports, or whether it is confined to vessels coming to *French* ports. It is objected to the captors, however, that the *onus* lies on them to adduce positive evidence that such a rule has obtained universally in the *French* Courts, notwithstanding the restricted terms of the decree, and I admit that this demand is not unreasonable. There are, however, two cases in which the captor may so far discharge himself as to throw the burthen of proof on the other side ; the first is, where he has produced strong analogical proof on which the Court may venture to found a reasonable presumption that no such rule obtains, secondly, where he has produced a certain degree of proof, and where no proof is adduced by the claimants in opposition to it, they having it in their power to produce direct evidence in opposition if the fact, would enable them so to do, as they possess greater facilities of information. In such cases the Court is bound to say that the captors have satisfied the
requisitions

requisitions of the law, and that there is that moral probability which will justify the conclusion. I think the observation of Dr. *Lushington* correct, that I am not to consider what would have been the fate of this ship if she had reached *Tonningen*, but what would have been her fate if the enemy had carried her into a *French* port. From the import of the decrees themselves, I think it appears to be the policy of *France* to require that her allies shall exercise the same measure of hostility against the common enemy as she herself does. That, indeed, is a general principle of the law of war ; this country adopts the same policy, and confiscates the property of allies trading with the enemy without a licence from their own government, just as it does *British* property in like circumstances ; and *France* certainly has never been behind hand in her expectations of this reciprocal assistance from her allies. She has gone the length of considering the ports of her allies as being no less subservient to the purposes of these *French* regulations than her own ports ; and those allies seem to have evinced a weak unprincipled submission in this as in every other instance. What is the language of the *Neapolitan* papers which are now before the Court ? A number of *American* ships had arrived at *Naples* upon the faith of a Decree issued by that Government, assuring them of the liberty of disposing of their cargoes in that port, on the condition of exporting the produce of that kingdom ; they were immediately seized by the *French* and *Neapolitan* ships of war, and were afterwards confiscated. The *American* Consul remonstrated ; and the *Neapolitan* Minister for Foreign Affairs, in his answer says “ the King “ has not seen without sorrow the small conform- “ ity which is found between the representations made

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papers invoked
into the case of
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“ in the remonstrance, and the principles adopted by
 “ the Government of the United States, and mani-
 “ fested in its resolutions, contained in the Act of the
 “ 1st of *March* last year, against the commerce of
 “ *France*, and the States attached to the political
 “ system of the *French* Empire.”—Here then the
French empire, and the nations attached to the political
 system of *France*, are completely identified ; the ships
 which were seized at *Naples*, were proceeded against
 at *Paris*, which could be upon no other ground, than
 that *France* considers the ports of her allies as subject
 to the same degree of injurious restriction as her own.
 If that is the case, and if this is the manner in which
France dictates the law of war to her allies, res-
 pecting the conduct which they are to observe
 towards the common enemy, though I cannot take
 upon myself to say absolutely, that the absence of
 a certificate of origin in these cases would have led
 to condemnation, because the conduct of the courts
 of *France*, acting under the direction of the govern-
 ment is so irregular, as to leave no certain ground
 of conjecture as to the application of almost any prin-
 ciple whatever, yet I may safely venture to assert, that
 no man can suppose that the want of such a document
 would not be highly dangerous. I observe that the
American Consul at *Hamburg*, considers these decrees
 as applying universally ; he says in his letter addressed to
 the masters of the *American* ships bound to *Hamburg*,
 “ In the present unprecedented crisis, such great and
 “ almost daily changes take place, and the measures
 “ of the belligerents affecting commerce, are put
 “ into such immediate operation, that it is impossible
 “ for the most prudent to avoid the injuries, which
 “ on every side lie in wait for fair neutral trade.”
 Now this is an observation which cannot be intended

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to apply to the regulations of this country ; because, be their operation what it may, the fact is notorious that proper time is always allowed to put neutral merchants on their guard. But he goes on to say, that “ the *French* Custom-house officers or douaniers, “ without any official intimation to the foreign agents “ here, have some time since, in virtue of an Imperial “ Decree, applied the commercial regulations and “ laws of *France* to the trade of this city, and with- “ out any exceptions, require certificates of origin, “ signed by the *French* Consul at the place of ship- “ ment, for all articles attempted to be introduced “ here.” Of this promptitude in the proceedings of the *French* Government, the very next paper which is addressed by the *French* Consul at *Bremen*, to the President of the senate of that city, furnishes an instance. His letter begins in these words: “ I am “ eager to inform you that it is the intention of his “ Majesty the Emperor and King, my august sove- “ reign, that all navigation upon the *Wefer* be pro- “ hibited. It is his Majesty’s desire that all vessels, “ even *French*, entering the port of the *Wefer* be “ stopped, provided they are wholly or partly laden “ with colonial produce, or any other goods of what- “ ever kind that *England* can furnish : the goods are “ to be put under sequestration, and taken in charge “ until new orders. Vessels laden solely with mer- “ chandize, which it is *impossible* *England* can furnish, “ are to be exempted. I am finally ordered to take “ the most efficacious measures that the intentions “ of his Majesty may be strictly and immediately ful- “ filled. I am now occupied in executing those “ orders, and hasten to warn you thereof, in order that “ you may immediately inform the merchants of this city, “ that they may not attempt to render ineffectual the

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“ measures taken for the rigid and *prompt* execution
“ of the orders of my sovereign.” In these papers there are many instances of the changeable system which *France* has adopted, with a view of preventing all commerce in articles, not merely of *British* origin, but which it is possible for *England* to furnish, although possibly proceeding from foreign sources. Now really looking to the promptitude with which these decrees are enforced, to what has been their general operation, looking to what the policy of the *French* Government has been with respect to *America*, looking to what is, stated in the *Neapolitan* papers, looking also to the general want of equity in the *French* Courts of Prize; I am of opinion that the captors are justified in saying that they have rescued these vessels from danger, and that they are entitled to salvage. In laying down this rule, I should lose sight of all justice, if I took into consideration only the advantage of the *British* cruizers therein; it appears to me to be a measure, to say the least, not less beneficial to the commerce of *America*, because it must naturally be supposed, that if the recaptors are to have nothing but the chance of a law-suit for their trouble, the service of recapture will never be performed. If a service is done in the particular instance, and is fit to be encouraged in general practice, it is unjust to say that the salvage is given merely for the benefit of one party. On the whole of the circumstances of this case, without looking minutely into the varying policy of *France*, I think there is very rational ground to apprehend that the *French* Prize Courts would have considered these ships as legal captures, and therefore I shall pronounce for the usual salvage.—A similar question arose upon the capture of *American* vessels by *Danish* cruizers, when the Court made the same decree.

JAMES COOK, JOUGAIN.

July 31st,
1810.

JUDGMENT.

SIR *William Scott*.—This *American* ship, though navigating with a professed destination to *Tonningen*, was captured at the entrance of the *Texel*, three or four miles west of *Kickdown*. The situation of the vessel will justify the legal conclusion, that the master intended going into that port for the purpose of disposing of his cargo, and throws the *onus* upon him of exonerating himself by just and satisfactory explanations. What then is the account given by the master in this case? he says nothing of the situation of the vessel at the time of capture, and this is the more alarming, because he is principally concerned in the navigation of her. Now in any case of this nature, supposing it to be fraudulent, it is obvious that the master must be the principal agent, and it is highly probable that the mate also is a party to the fraud, because such a plan is not easily carried on without the assistance of him as an accomplice. On questions, therefore, arising upon the destination of the vessel, although in other cases the Court is disposed to give great attention to the evidence of the master and the mate, I do not think they are entitled to any advantageous preference. Where they speak to the situation of the vessel, their testimony must be outweighed by that of the common mariners, unless there is reason to suggest that the mariners had been debauched by the captors. The mate says that the course of the vessel was at all times directed to *Tonningen*, and so says the master, but he

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suppresses a very important fact which is admitted by the mate, and the other witnesses, that he sent a letter on shore by a Dutch fishing vessel a few hours before the capture: he denies also that he had a signal flying for a pilot, (although the fact appears upon the log,) and seems to expect that the Court will receive his explanation as satisfactory, when he says that he made the signal for the purpose of speaking a vessel, which he took to be an *English* frigate. Here then is clearly that sort of conduct in the master, which renders his evidence highly suspicious. The log speaks a language extremely indicative of an intention to enter a *Dutch* port: it appears that they approached the coast of *Holland* the day before, and from that time kept as close in to land as possible. I must observe that if it were necessary that a ship going to the northward should make the *Dutch* land so far to the southward of the *Texel*, she could not be permitted to sail close along the shore, as there can be no doubt that advantage would be taken of the facilities which such an opportunity would afford. The fact is, she continues (as the phrase is) to hug the coast, she lies to in the night, and as the two mariners say they heard the master declare, “in order that they might not overshoot the *Texel*.” The accuracy of the log has been attempted to be impeached in the argument, but I can never take any suggestion of that sort against a document of this authentic nature unless it is supported by affidavit; it cannot be impeached with effect upon the mere pretence of interlineation, or a difference in the colour of the ink, or any slight objection of that kind. The log says, that the ship lay-to off the *Texel*, and spoke a fishing-boat; at eight a pilot came alongside, and it appears that the ship had not moved away from the entrance
of

of the *Texel* when she was seized. Upon all this evidence I think it is not an arguable proposition, that there was not an intention of going into that port. With respect to the cargo, I do not see how it is to be exempted from the fate of the ship; the master, who is also the owner of the ship, can hardly be supposed to have risked his vessel without the privity of the owner of the cargo, and in its service; but the fact is not very material, as the owners of cargoes must at all events answer to the country imposing the blockade for the acts of the persons employed by them, where, as in this case, the blockade is known at the port of shipment; otherwise, by sacrificing the ship, there would be a ready escape for the cargo for the benefit of which the fraud was intended. It remains, therefore, only to be considered whether there was in reality any subsequent change of intention on the part of the master, and whether that change of intention was so acted upon by him as to deliver the ship and cargo from the penalty of confiscation. To say that there is no case in which the master of a neutral ship, losing sight of a malignant purpose originally entertained, and taking another course more consistent with his duty to other countries, might not be exonerated, is a proposition which I am not inclined to maintain. It is proper that there should be a *locus penitentiæ*, and if the case had been brought up to this, that the intention of going to a *Dutch* port was actually abandoned, and that the ship was captured while proceeding to some open port, the claimants would have had the benefit of that fact. But what is the case here? The ship is captured in a place where the fact is conclusive against her, for it has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded

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blockaded port even to make inquiry': *That* in itself is a consummation of the offence, and amounts to an actual breach of the blockade. The master does not inform us what was the purport of his communication with the shore, through the medium of the *Dutch* fishing vessel, as he suppresses the fact entirely; it appears, however, from the evidence of the two mariners, that he afterwards made some little appearance of steering for *Tonningen*.—But what would be the legal effect of that, supposing the fact to be more clearly made out than it is in this case; he had already broken the blockade, he had come up to ground which it was improper for him to tread, and, finding the impossibility of going in, he turned away. Is that a *locus penitentiae*? The matter was closed upon him, he had committed the offence as much as in him lay, and having been defeated in his purpose by a mere impossibility of effecting it, he cannot be heard to aver an innocence of intention. It is moreover extremely probable that the frigate was in sight before this pretended change of intention was thought of; for it appears that the communication with the pilot-boat took place at eight, and the ship was captured at ten, previous to which time, by the evidence of the mate, it appears that she had been becalmed at least an hour, and therefore the capturing vessel could not have come up very rapidly.—Ship and cargo condemned.

The Court afterwards, on being requested to restore the master's private adventure, said, Wherever it appears that the master is the principal agent in a fraud, I shall not give him his private adventure, but shall leave him to the mercy of the captors.

ROBERT HALE, RANDALL.

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THIS *American* ship had sailed from *Providence*, *Rhode Island*, with a miscellaneous cargo, and was seized in the river *Yadhe* by the *French* douaniers, by reason, as stated by the master, of her not being furnished with a certificate of property, and the *Yadhe* being interdicted by the *French*. Her cargo was landed, and the ship released on bail being given to answer the adjudication in the *French* Prize Court, but before she left the river the vessel was brought out by the boats of His Majesty's Gun Brig, *Thresher* and *Broedageren*, and a claim of salvage was now set up on their behalf for this service.

Salvage claim of,
for ship liberated
on bail--refused.

JUDGMENT.

Sir *William Scott*.—I think this question has properly been brought before the Court, but I do not think it a case in which a claim of salvage can be sustained. The ship had been seized in the *Yadhe* by the *French* douaniers, who, I presume, are acting there for the rights and interests of the Government of *France*, and must be considered as captors for the authority under which they act. The case was submitted to the Prize Court at *Paris* for adjudication, and in the mean time the ship was liberated on bail; and this not only on security but by an actual deposit of money. I must therefore take it, that this ship having been so liberated, was free to depart, as far as the rights of the *French* Government, and the persons employed by that government were concerned. Her stay was voluntary, she had dropped down the river towards

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towards the neighbourhood of the *British* gun-brigs, and was there waiting the arrival of the office copies of her papers from *Paris*, as the papers themselves were necessary for the decision of the original cause. Whether from her proximity to the *French* armed boats the service of bringing her out was attended with any personal danger to the officers and men who were employed in it, does not appear : but supposing it to be so, that would not be a ground of salvage, unless the vessel was in *French* possession. That, however, was not the case, she was no longer detained, she had left a representative, on which the sentence of the *French* Prize Court was to operate, in the deposit of 24,000 francs. If the Court condemned, the effect of the sentence would be to confiscate not the ship, but that sum of money which had been accepted as a substitute : if, on the other hand, the Court restored, neither the ship nor the substitute can be said to have been in peril. And therefore in no case does it appear that any service has been performed, because the bringing out of the ship, which was at liberty, was not a rescue of the 24,000 francs, upon which the sentence of the Court was to operate ; it was no effective service to the owners to bring away the ship, which was in no danger, whilst it left the representative exposed to the same hazard as before. Then it has been said, that the ship might have been seized again, and certainly she might ; but that is not enough : the Court will not grant salvage on prospective and ideal danger, it must be proximate and certain. What is there to raise this phantom ? Why, that the *French* douaniers had no authority to release the ship on bail. But why is the Court to suppose that ? They are something more than simple captors.

captors, they are public agents; and the fair presumption is, that they knew that what they were doing was not contrary to the regulations of their own Government. The re-seizure of a ship after the value had been deposited in a Court of Prize, was never yet heard of; from the moment the bail is accepted, the ship is sacred to the Government by which she has been liberated, for it would be monstrous injustice to say, that the thing itself, and that which has been accepted in lieu of it, shall be condemned for the same act. Allowing for all the violence and irregularity which mark the proceedings of the *French* Government, the improbability is so striking, that I cannot entertain the notion that this ship was in any danger of being made prize of a second time by the enemy. And, therefore, whatever dangers may have been encountered in bringing out the vessel, the parties must seek their reward in the consciousness of having done their duty as brave men, and in the approbation of the country; but as no service has been rendered, there is no ground for salvage against the owners.

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WANSTEAD, MORTON.

Salvage; claim of
privateer to share
with the king's
ship—rule as to
the apportion-
ment.

IN this case a claim was advanced by the *Sorciera* privateer to share in the salvage of this vessel with the *Amelia* frigate the actual recaptor; from the evidence of the witnesses examined on board the recaptured vessel, it did not appear distinctly whether the privateer had actually joined in the chase, but that fact being admitted by the King's ship, it became a question whether there was a sufficient co-operation to entitle the privateer to share, and in what proportion.

JUDGMENT.

Sir *William Scott*.—According to the deposition of *Boyes*, the witnesses examined in preparatory, it would rather seem that there was no chasing on the part of the privateer, as the result of his evidence is simply that this ship was retaken by the *Amelia* frigate, the lugger being in sight. Now certainly the mere fact of being in sight at the time of a recapture by a King's ship, will not entitle a privateer to share in the salvage; but I think, by the affidavits given in on the part of the King's ship, it does appear that there was an actual chasing by the privateer, and the question then is, whether this was a fraudulent or an effective co-operation. If the privateer, after a long chase of the enemy by the King's ship, threw herself purposely in the way, and snapped up the prize, at the very moment when she was on the point of surrendering to the force of the King's ship, when the King's ship was *in quasi* possession, the Court would

would in a case of that kind hold such an interposition to be intrusive and fraudulent. There may be other cases in which a privateer may be a most valuable associate; she may have advantages of situation, of wind and weather, all which may make the interposition of a privateer highly useful, even after a chase is begun. But then to determine this, the facts must be clear before the Court. Now what sort of evidence is there in this case? Here is only one deposition taken. It is no excuse to say, that in ordinary cases of recapture one witness is sufficient, because this was a contested case, and known to be so; the privateer ought to have given an allegation, and examined witnesses, by which means the facts would have come out in a regular manner. In such a case, to lay down any general principle, which, perhaps, might not apply to a demonstrated state of facts, appears to be nugatory; in this defective state of the evidence, I can only proceed upon the admitted fact, that the privateer was actually in chase, and therefore I shall pronounce for her interest, and give a salvage of one-sixth.

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JUDGMENT RESUMED.

Having already determined that one-sixth shall be the portion of salvage on this recapture, it is not necessary for me to consider whether, under any circumstances, the Court could give more. The only question is, as to the distributive proportion which is left by the Act of Parliament to the discretion of the Court, and, as I apprehend, on this principle—that where a recapture is made by a King's ship, all other King's ships in sight are permitted to come in as joint salvors; there is a reciprocity in this rule, which operates sometimes to the advantage, and sometimes

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to the disadvantage of every vessel in the service. Not so where a recapture is made by a King's ship in sight of a privateer; in that case there is no reciprocity, as the privateer is not permitted to share. It would be hard, therefore, if the privateer being the actual captor, and not having that reciprocal interest in other cases, she should be deprived of a much greater proportion of the reward, and should only share on terms of reciprocity where the King's ship is only the constructive recaptor, from the mere accident of being in sight, perhaps at a great distance, and unconscious of the fact. Now what are the circumstances of the present case? It did appear to me, on the evidence offered to the Court, that the interposition of the privateer was not fraudulent: it was not the case of a privateer stepping in, at the end of a long chase perhaps, to deprive the King's ship of the due reward of her own activity and enterprize. Here it was clear that both were in actual pursuit of the enemy; it was not a constructive recapture on either side; there was a concurrence of endeavour in both, though the privateer came up first and struck the first blow. Considering them both, therefore, as joint actual recaptors, I see no reason why I should take the case out of the common operation of that principle which apportions the reward to the parties according to their respective forces. *

* In the case of the *Providence*, which was a case of the same description, heard on the same day, it appeared that the privateer was the actual captor, the King's ship being in sight. The Court, therefore, made the distinction, and having decreed one-sixth salvage to be paid by the owners of the recaptured vessel, only allowed the King's ship to share against the privateer as upon an eighth.

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THIS vessel, pierced for sixteen guns, with gun tackle, bolts, &c. was taken possession of with others in the harbour of *Browsers-haven*, after surrender of the island of *Walcheren*, in virtue of orders from Commodore *Owen*, commanding a division of His Majesty's ships engaged in the expedition. Claim was now given on behalf of *Minter and Co. Browsers-haven*, for this vessel under the second article of the capitulation, by which it was stipulated *all private property should be protected*.

Privateers not within the terms of a capitulation protecting private property generally.

On the part of the captors it was contended, that from the out-fit and structure of the vessel there could be no doubt of her having been employed as a ship of war, and that consequently a public character attached to the vessel from the nature of that employment, which excluded her out of the provisions of the capitulation.

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per *William Scott*.—I am of opinion that these ships were very properly seized; they are pierced for guns, and on that aspect alone bore a military character sufficient to distinguish them from the other property which was to be protected under the capitulation. It appears, however, that Commodore *Owen* had some doubts upon the subject, and referred himself to the decision of the commanders of the expedition; but the necessity of other engagements interposed to prevent him from taking the matter into consideration, and

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under the exercise of a very proper discretion he brought the ships away, for the purpose of submitting them to the proper tribunal of his country. In what manner these vessels had been employed the Court can only conjecture, as there was no crew on board at the time of capture, and the deficiency could not have been supplied by the production of any of the captors under a release, as the utmost they could depose to would be that these ships were lying in the harbour in a dismantled state. The question, however, is, whether the owners of property of this description are entitled to restitution under the terms of the capitulation, by which all private property is protected. I need not say that it is the disposition of the Court to give the parties the fullest protection which they can be entitled to claim under the capitulation, but it appears to me that there is hardly evidence enough before the Court to enable it to form a judgment upon the subject. That privateers are private property in one sense, is certainly true, but they have, at the same time, a public character impressed upon them by their employment : though they are private property, they are still private property employed in the public service. And, therefore, if it should turn out that these ships have been equipped as privateers for the purpose of cruising against the commerce of this country, I could have no hesitation in saying that they are not a description of private property that can be brought within the provisions of the treaty. If the *Dutch* Commissioners themselves had been asked at the time whether they supposed that the capitulation was to protect privateers employed against this country, I cannot doubt that they would have disclaimed any such expectation. I cannot for a moment assent to the doctrine that a privateer

vateer has no public character, unless she is in actual employment at the time as such. Undoubtedly if that be her real and primary character it would not be obliterated by laying her up for four or five months : her public character would continue as long as her commission continued. It might be very convenient, under the existing circumstances, that the owners of these vessels should divest them of the appearance of ships of war : an expedition from *England* was expected, and an owner would not, at such a moment, chuse to keep his guns on board, and exhibit his colours, in order to declare the purposes for which his vessel was employed, and to point her out to the attacking force as an object of seizure. I shall, therefore, not attend to that circumstance in the proof I shall require ; it will be no satisfaction to me to hear that, at the moment of capture, these vessels were not so employed ; the true question is, whether they were privateers or not. Nothing can be more meagre than the evidence exhibited by the claimants. The testimony of Mr. *Fector*, who was an indifferent spectator, is merely negative ; he says that, “ he hath often seen “ the *Dash*, and remembers her being built at *Flushing* “ in the year 1805 : that the said vessel, though “ pierced for guns, has never, *as he believes*, been “ commissioned or employed as a vessel of war.” Perhaps not—but I wish he had gone on to state for what purposes she was built, and in what manner she has been employed. In this dearth of all evidence to repel the presumptions arising from the appearance of the vessel, nothing but the respect which is due to a capitulation would justify the Court in granting to a person the privilege of still further proof, who, under

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general circumstances, is not authorized to claim. On the other side, I think that the captors have strong *prima facie* evidence, in the construction of the vessel, that she may have been employed for warlike purposes; but it does not go the whole length of what I conceive to be necessary—That this vessel is applicable to the purposes of war, is no proof of her being so applied. The structure of the vessel may be material, and it will be for the claimants to shew in what manner she has been employed, for upon the result of that evidence alone shall I feel myself in a condition to decide this question.

On a subsequent day the ship was restored as private property, the claimants having furnished sufficient proof that she had never sailed under a commission of war, but had been employed exclusively for commercial purposes.

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JUDGMENT.

SIR William Scott.—This is the case of a *Hamburgh* vessel which had sailed from that port on a fishing voyage, and was captured on her return;—now, clearly, by the present policy of this country, it is not permitted to a *Hamburgh* ship to sail from that port on a whaling voyage, and to return again to *Hamburgh*, because that is a voyage which is expressly prohibited by the Order which His Majesty has recently issued. **His Majesty** is there pleased to direct “that all vessels “ which have cleared out from any port so far under “ the controul of *France* or her allies, as that *British* “ ships may not freely trade thereat, and which are “ employed in the whale fishery, or other fishery of “ any description, save as herein-after excepted, and “ are returning or destined to return either to the “ port from whence they cleared, or to any other “ port or place to which the *British* flag may not “ freely trade, shall be captured, and condemned together with their stores and cargoes, as prize to the captors.” So that now, certainly, such a voyage, under such circumstances, would be illegal, though the ship were entirely *Hamburgh* property, without any intermixture of other interests. . But it appears by this same Order, that before it was issued, this voyage was not illegal, and therefore an exception is made, directing that all vessels “ which shall have sailed on their “ present voyage previous to notice of this Order, or “ reasonable time for the notice thereof, shall be “ permitted to return to their own port without mo-
“ lestation

Order in Council
respecting fishing
voyages from and
to ports from
which the *British*
flag is excluded
—application of.

See App. L.

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“lestation on account of any thing contained in this
“Order, provided they shall not have continued on
“their fishery as aforesaid, more than twenty-one
“days after due warning of this Order received at
“sea.” And then it goes on to direct that “the
“warning shall be endorsed on the ship’s papers.”
In the present instance no such warning had been
given, and therefore, this is a vessel which, it is de-
clared by the Order itself, “shall be permitted to re-
“turn to her own port without molestation.” Condem-
nation has, however, been pressed against this vessel
upon another ground; it has been suggested that there
is an appearance of *Danish* interest in the property,
and the case has been assimilated to a class of vessels
which came before the Court some years ago, which
were employed in the *Dutch* whale fishery. But in
those cases the ships continued under the management
of the former *Dutch* owners; they were fitted out in
the same ports, and employed in the same occupation
as before; there was nothing, in short, to distinguish
them, from the aspect they originally bore, except a
formal piece of parchment which had passed between
the parties. The Court, therefore, held that the *Dutch*
character still attached to them, whatever might be
the national character of the persons to whom they
had been transferred. In this case, on the contrary,
there is not any ground for the suggested connexion
with *Denmark*, except what arises from the contiguity
of *Hamburg* to *Altona*; but if this, in all its circum-
stances appears to be fair *Hamburg* traffic, in which
the merchants of that place were as likely to embark
themselves, on their own account, as the merchants
of *Denmark*, I cannot infer *Danish* interests from mere
contiguity. I cannot, on account of any such suspi-
cion,

cion, permit the whole commerce of that unfortunate city to be interrupted and destroyed. Shew me a case in which *Danish* interests are really interwoven in the property, and there the ostensible *Hamburgh* character shall not protect the vessel; but in this case I do not see any thing on which I can build such a presumption. There were two papers on board this vessel, which have also been made the foundation of an argument. One is a certificate, or *Danish* pass, purporting that there are no *Danish* subjects on board. It may be the policy of *Denmark*, when her own sailors are wanted for the public service, to require that they shall not navigate foreign vessels; but a *Hamburgh* vessel does not become a *Danish* vessel merely because she accepts a certificate to that effect. The other paper is of more consequence, as it is a permission from the *Danish* embassy at *Hamburgh* for the ship, to this effect, that “the voyage is undertaken with the permission of the proper authorities, as well as of the Imperial *French* Authorities; and that no objection exists to her going out of the *Elbe*.” Now it has been said that this incorporates the vessel in the policy of *Denmark*, and gives her a *Danish* character, but to me it does not appear to operate to any such effect. What is the purport of it? That the ship is perfectly neutral, and that the voyage does not interfere with the policy of *Denmark* or of *France*, with respect to the commerce of other states. It no more constitutes this a *Danish* vessel than this Order in Council, if it had been on board, would have constituted her an *English* vessel. Then what are the other objections? The master states, that, “on this voyage he had not failed to any port or place except *Greenland*,” and it is argued that, as *Greenland* is a *Danish* settlement,

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if he went there to trade, it would be a trading between *Hamburgh* and *Denmark*, which is prohibited. But the whales which compose the cargo of this vessel were not taken from the shore, they were caught at sea, on the fishery, and every one knows that, in popular language, a voyage to *Greenland* is a voyage to the *Greenland* seas, and not to any place that can be considered as a port of trade. I think it is extremely questionable whether the *Danes* have any establishment there at all; if they have, it is not likely to consist of any thing more than a few store-houses for the use of vessels employed in the fishery. Then again it is said, that this vessel was proceeding to *Heligoland*, on her return, in violation of the Order in Council, prohibiting the entrance of foreign vessels into that port. But the ship, it is perfectly clear, was not going there with any intention of entering "the port or harbour," her object was merely to touch there, in order, as the master states, "to obtain information whether he might proceed direct to *Hamburgh* without touching at a port in *England*." The parties appear to have been extremely anxious throughout to conform to the regulations of this country. With this clear proof of a destination to *Hamburgh*, it cannot be supposed that any part of her cargo was to be deposited at *Heligoland*, or that there was any intention of violating the Order in Council. If the fact be that there is danger of an intermixture of *Danish* interests in this trade, it must be prohibited by a specific regulation, and that is now done by the Order of the 9th *May*; but as this vessel sailed from *Hamburgh* before that Order in Council was issued, the voyage was open to her, and I shall, therefore, restore the ship and cargo, allowing the captors their expences.

See App. M.

SAN FRANCISCO, DU PAULA.

Aug. 10th,
1810.

JUDGMENT.

SIR William Scott.—This is the case of a *Spanish* ship, which was recaptured, after being more than twenty-four hours in possession of the enemy. An extract from the *Cadiz Commercial Gazette*, dated 5th September 1809, has been produced by the claimants, referring to an article of a treaty between that country and the *English* Government, by which it would appear that the vessels of the respective countries were, in future, to be restored on salvage, although the treaty itself has not yet been promulged. I can have no doubt, from the manner in which the fact is announced in the official *Gazette of Spain*, that the article was to take effect from that time. I shall, therefore, in this case, decree restitution to the *Spanish* claimants, on payment of a salvage of one eighth, and shall apply the same rule in the other cases, if they come within the same limit of time, unless the captors are able to procure evidence sufficient to repel the presumption arising upon what is here furnished by the claimants.

Salvage on *Spanish* ship recaptured from the enemy.

See App. M

April 4th,
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LA GLOIRE, AND THREE OTHERS.

JUDGEMENT.

Head-money
limited to the
actual captors.

• *Superbe*, 26th
June 1710.
Duchess Anne,
6th July 1710.
Toulouze, 13th
June 1715.

SIR William Scott.—The present question arises on the admissibility of this allegation, which is offered to the Court on behalf of several ships composing a part of the squadron by which these *French* frigates were captured, and claiming upon the principle of associated service, to share in the head-money. I shall not repeat the complaint which I have already had occasion to make, that this suit has been long depending, although it is of a nature which, in a peculiar degree, requires to be brought to its termination with the greatest expedition. Head-money, according to the principle which is recognized in this and the superior Court, is the peculiar and appropriate reward of immediate personal exertion, and consequently wherever any claim to participate in a bounty so appropriated has been advanced, it has always been considered in a more rigid manner by the Courts than those which arise out of the general interests of prize. There are some very ancient cases in which the question has been decided * : in the case of the *Superbe* ; in the case of the *Duchess Anne* ; and also in the case of the *Toulouze*, in which it appears by a note of that judgment, communicated to me by a very eminent person of great experience, and of the longest practice in these Courts, that the prize was condemned to one man of war, as actual captor, and to two others as assisting at the capture : but the bounty-money was ordered to be paid only to the actual captor, *the others not being actually engaged with the prize*. This is the invariable rule

rule which, for more than a century, has been applied to cases of this description, and therefore the circumstances must be of very a peculiar nature to induce the Court to recede from a practice so long and so universally established. As to three of the ships the *Achille*, the *Windsor Castle*, and the *Polyphemus*, I need only read the 6th article, which recites the grounds of their respective claims, in order to dispose of them. It says, “ that during the general chase the enemy’s ships
 “ *L’Infatigable*, *L’Armide*, and *La Minerve*, ran a
 “ distance of 88 miles, and *La Gloire* a distance of
 “ about 108 miles, before they were captured; and
 “ the *Centaure*, *Mars*, *Monarch*, and *Revenge*, by out-
 “ sailing the other ships of the squadron, were enabled
 “ to effect the captures in question without any direct
 “ aid of any of the rest of the squadron, consisting
 “ of the *Windsor Castle*, *Polyphemus*, and *L’Achille*,
 “ neither of them being within gun-shot of any of
 “ the enemy’s ships, either before or when they
 “ struck. But they were all in sight and in
 “ chase; every exertion was used to get up with
 “ the enemy, the chase was a general one, the said
 “ captures were the result of a joint co-operation
 “ of an associated fleet, the whole of whom assisted
 “ in exchanging the prisoners, and afterwards in
 “ bringing the said prizes safe into port.” Now
 it is clear that all these circumstances, taken separately or collectively, are not such as will bring these ships within the established principle; they were not engaged in fight, they were not actual captors, they were merely in sight and in chase, and their claim is quite unsustainable on any principle that has been sanctioned by this or the superior Court. What the reason is that has prevented the discussion of the claims
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of these three ships before, I do not know ; four years have elapsed since the capture of the prizes, and the delay which has taken place has, I suppose, prevented the distribution of the head-money. Matters of this kind cannot, consistently with the honour of the Court, be permitted to be hung up for so many years together. The Court must prescribe a limitation of time for such claims. If head-money is to be considered as the reward of personal exertion, all questions arising out of it ought to be brought to an early determination, and not be kept fluctuating in a state of uncertainty until many of the persons interested are consigned to their graves. It has been suggested that this case stood over because the parties were in hopes of settling the matter by arbitration. But they must finally have come to this Court for a decree, otherwise the head-money would not have been paid ; and I wish it to be clearly understood, that if parties propose to go to an arbitration in a matter of this kind, it must be speedily resorted to, otherwise I shall find a necessity for proceeding to adjudication upon the point, in order to secure to the persons interested the speedy possession of that bounty which it was intended they should receive. What may be the proper limit of time within which the arbitration is to take place, I shall consider ; but certainly it shall not be one which will countenance an unnecessary delay. Every part of this allegation which relates to these three ships, must be expunged, the Court having decided against their interest. Their case rests upon a very different footing from that to which it has been assimilated of ships claiming to share in bounty money arising out of a general engagement ; in that case there can be no selection of combatants. It is a service in which all
equally

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ally participate ; the whole fleet is supposed to be engaged with the whole of the opposing force ; it is so in the reality of the fact, and always so in supposition of law ; and therefore all are equally entitled to partake in the benefit of prize and head-money. But in the case of a general and remote battle like this, where the parties are dispersed to a great distance from each other, there may be a competition of exertion, and yet a separation in contest. In such a case there is no danger of that confusion and uncertainty as to the actual services of each individual ship which was suggested in argument, because by the difference of locality the facts must be capable of being sufficiently substantiated by evidence taken *in fact*. But the mere endeavour to come up and fight with the enemy either before or during the battle, does not sustain a claim to participate in the head-money ; unless the effort is successful, the endeavour to do the act does not constitute the act itself so far as the question of head-money is concerned. Some ships may make laudable endeavours to render assistance *after* battle, by helping to remove the prisoners, and performing other acts of an useful nature : but that is not doing in the battle, and will not bring them within the principle which I have cited. I come now to consider what is the case of the *Revenge*, in order to see whether it can be brought within the narrow limits of that principle by which I think the discretion of this Court is circumscribed, under the authority of former decisions. The second article pleads, that “ about one o'clock in the morning of the 25th day of September 1806, a Squadron of His Majesty's ships, under the orders of Commodore Sir Samuel Hood, consisting of the *Centaur*, *Mars*, *Monarch*, *Revenge*, *Achille*,

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“ *Windsor Castle, Polyphemus, and Pilchard* schooner,
 “ being then off *Chafferson* Light-house, the wind blow-
 “ ing from the N. E. a fresh breeze, and the weather
 “ clear, the *Revenge* to windward of the fleet, and
 “ the *Monarch* to leeward thereof, and the whole
 “ upon the look-out, a signal was made by the *Mo-*
 “ *narch* for an enemy in the south-west quarter. That
 “ Commodore Sir *Samuel Hood*, observing them to be
 “ seven sail in number, and apparently large ships,
 “ made a signal to form the line, but shortly after-
 “ wards, perceiving the enemy to bear up and make
 “ all sail towards the S. S. W. a signal was made from
 “ the *Centaur* for a general chase, which was instantly
 “ obeyed by every ship of the squadron. That the
 “ *Monarch*, from her position, was the leading ship,
 “ and was closely followed by the *Centaur* and *Mars*,
 “ and as day-light approached, the enemy was dis-
 “ covered to consist of five large *French* frigates and
 “ two corvettes; about five o’clock the *Monarch*
 “ began firing chase guns at the enemy, which fire
 “ was returned, and about six o’clock one of the
 “ said frigates, going off towards the westward with
 “ a view to escape, a signal was made to the *Mars* to
 “ chase her, which she accordingly did, and about
 “ twelve o’clock came up with and engaged the said
 “ frigate, which shortly afterwards struck, and being
 “ taken possession of, proved to be the *French* frigate
 “ *L’Infatigable*, of 44 guns, and having on board
 “ 640 men. That at the time when she struck, the
 “ whole of the said squadron were in sight, and were
 “ co-operating in the chase, but neither of them
 “ were within a less distance than ten miles, nor
 “ were any of the ships of the said squadron ever
 “ within gun-shot of the said prize *L’Infatigable*,
 “ save

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“ save and except the *Mars* and *Monarch*, the said
 “ prize being the sternmost frigate, which was fired
 “ at by the *Monarch* previous to her hauling off to
 “ the westward.” The third article upon which
 the claim of the *Revenge* is grounded, then goes on
 to plead, “ that the general chase was continued after
 “ the enemy’s other frigates by all the other ships of
 “ the squadron, and soon after six o’clock one of the
 “ said frigates and the two corvettes went off towards
 “ the south-east, and escaped, but the remaining three
 “ frigates kept running towards the south-west in close
 “ order, with the evident intention of supporting each
 “ other. That the *Monarch* being the leading ship,
 “ about a quarter past ten o’clock, opened a heavy
 “ fire on the three said frigates, who, by maintaining
 “ a running fight, very much damaged and crippled
 “ the sails of the *Monarch* before any of the other
 “ ships of the squadron could come up. That about
 “ eleven o’clock the *Centaur*, being got within gun-
 “ shot, also commenced close action with two of the
 “ said frigates, and occasionally firing at the third;
 “ and about twelve o’clock *L’Armide*, one of the said
 “ frigates, mounting 44 guns, with 590 officers and
 “ men on board, struck her colours, when one of
 “ the said frigates, bearing a commodore’s pendant,
 “ made all sail to the westward to endeavour to
 “ escape. That soon afterwards the ensign halliard
 “ of another of the said frigates being shot away, her
 “ colours came down, and it being supposed that she
 “ also had surrendered, the *Centaur* immediately pur-
 “ sued the aforesaid frigate which had made sail to the
 “ westward; and in the mean time the frigate whose
 “ halliard had been shot away re-hoisted her ensign,
 “ and continued to engage the *Monarch*. That His
 “ Majesty’s

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“ Majesty’s ship *Revenge*, under the command of Sir
 “ *John Gore*, one of the said squadron, having in the
 “ course of the aforesaid chase passed every ship of
 “ the squadron, except the *Centaur*, *Mars*, and *Mo-*
 “ *narch*, she was, at the time when *L’Armide* struck,
 “ only about four miles distant, fast coming up, and
 “ then perceiving the other frigate, which was still
 “ engaged with the *Monarch*, endeavouring to make
 “ her escape, by edging off towards the eastward,
 “ out of the reach of the *Monarch*’s fire, and that,
 “ owing to the disabled state of the *Monarch*’s rig-
 “ ging, she was increasing her distance; the *Revenge*
 “ immediately hauled up to cross her course, came
 “ within gun-shot, and was just preparing to open her
 “ fire, when the said frigate, after firing two or three
 “ shots at the *Revenge*, struck her colours, and proved
 “ to be the French frigate *La Minerve*, mounting 44
 “ guns, with 609 officers and men on board. That
 “ the *Monarch* then making the signal that *L’Armide*,
 “ which had previously struck, was not secured, two
 “ of the *Revenge*’s boats were instantly hoisted out,
 “ she at the same time making all sail after the *Cent-*
 “ *taur* and the other frigate, and an officer and sixty
 “ men were sent, who assisted in taking possession of
 “ the said French frigate *L’Armide*, while the *Monarch*
 “ sent a party of officers and men on board *La*
 “ *Minerve*. That when the enemy’s frigate, carry-
 “ ing a commodore’s pendant, made sail to the west-
 “ ward, to endeavour to escape, and was chased by
 “ the *Centaur*, a running fight was maintained be-
 “ tween them until near three o’clock, when His
 “ Majesty’s ship *Mars*, after capturing *L’Infatigable*,
 “ as is particularly pleaded in the second article of this
 “ allegation, having joined in the chase of the frigate

in

“ in question, came up, crossed her course, and com-
 “ menced firing, and the said frigate then struck her
 “ colours, after a chase of about twenty miles from
 “ the place where the *Monarch* was left with *La*
 “ *Minerve* and *L'Armide*, and on being taken pos-
 “ session of, proved to be the *French* frigate *La Gloire*,
 “ mounting 46 guns, with 623 officers and men
 “ on board. That His Majesty's ship *Revenge*, after
 “ crossing *La Minerve* and compelling her to sur-
 “ render, crowded all sail after the said frigate *La*
 “ *Gloire*, then about eight miles a-head, leaving the
 “ *Monarch* with *L'Armide* and *La Minerve*; and at
 “ three o'clock, when the said frigate struck her
 “ colours, the *Revenge* having gained considerably
 “ on both the said ships, was only about four miles
 “ from and not within gun-shot of *La Gloire*.
 “ That by signal from the *Centaur*, the *Revenge* took
 “ possession of the said frigate, and her boats were
 “ employed in shifting the prisoners, the *Centaur* and
 “ *Mars* sending only two officers on board.”

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It is pleaded that *she was preparing* to open her fire
 against the *Minerve*,—but, in point of fact, she had
 not opened it. The *Minerve*, it is said, had fired two
 or three shots at her; but that these shots were received
 by her is not said, and it may now be difficult to prove
 that they were really discharged at her, or were other
 than random shots, discharged just before the act of
 striking, which followed instantly afterwards. The
Monarch then took possession of her, and the *Revenge*
 went in pursuit of the other frigate *La Gloire*, with all
 the promptitude which might be expected from the
 known activity of her commander, but he was not
 within gun-shot of her when she struck. With re-
 spect, therefore, to this latter prize the *Revenge* is
 clearly

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clearly out of the question. In that of the *Minerve* she approaches much nearer to the verge of the principle than any of the other vessels which did not fire, and perhaps, if these circumstances had been brought in proper time to the notice of the Court, so that the Court could now have possessed itself of the fact upon evidence from the *Minerve*, that the shots were really discharged at the *Revenge*, I should have thought them deserving of great attention. For if that fact were indubitably established it might raise a nice question, whether she might or might not be considered as actually engaged, although she had not fired a shot, and although, as it has been truly observed, it is the second or returned blow that makes the battle. But considering the length of time which has elapsed since the capture took place, I am not inclined to admit this claim, which is made to rest on an equivocal circumstance, of which there is now but little chance of obtaining any satisfactory evidence. It being the established principle that head-money belongs to the taker, I think it is my duty not to recede from that principle on behalf of an asserted interest of this nature, upon any state of facts that does not clearly and out of all question support such a character. Where the question either of fact or of law in favour of such an interest is dubious, it is fit that the Court should incline to the clear and incontestible interest of the actual taker, and should not be disposed to diminish, by an enlarged construction, the benefits which the law has exclusively appropriated to him.

ADAMS, TUBBS.

Feb. 14th,
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(Instance Court.)

THIS *American* ship, laden with tobacco, pork, beef, flour, and other articles, failed from *Boston* to *Trinidad*, where, upon her arrival, the master reported the ship, and the admissible articles were allowed to be entered, landed and sold; the tobacco, pork, and beef, being entered for exportation. While the ship remained, unloading and felling the permitted articles, a petition on behalf of Messrs. *Neblett* and *Swinden*, stating that they had imported 25 hogsheds of tobacco in the ship *Adams*, and praying that it might be permitted to be landed and sold, was presented to the governor, and leave granted, with the concurrence to be first obtained of the collector and controller of the customs, who, upon application being made to them, signed the permit. Part of the tobacco was, in consequence, hoisted into a boat alongside for the purpose of being landed, when the vessel and cargo were seized by Lieutenant *Briarly*, commanding His Majesty's ship *Oronoko*.

Breach of the
revenue laws—
condemnation.

JUDGMENT.

Sir *William Scott*.—This is a proceeding for the purpose of obtaining the condemnation of the ship *Adams* and her cargo, originally instituted in the Vice Admiralty Court of the island of *Trinidad*, and from thence removed by appeal into this Court. The ground on which the condemnation was sought, was

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a breach

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7 & 8 W. c. 21.

a breach of the Revenue Laws. A libel was there filed upon the 19th of *October* 1807, by *Alexander Briarly*, describing himself as Lieutenant in His Majesty's navy, and *commanding His Majesty's sloop of war Oronoko*. The breach of the Revenue Laws assigned was an unlawful importation of tobacco committed in the month of *August* of that year, and the seizure was made upon the 6th of that month.

A preliminary objection is taken, that it does not appear by any evidence in the case, that the party who makes this seizure, and proceeds upon it, was a person authorized to make such a seizure, for it must be a seizure made by a person *commanding one of His Majesty's ships*. And it is said that it is essential to the support of such a prosecution, that it should appear in evidence to the Court, that he was a person actually *in the command of one of His Majesty's ships*, and that this being a case of a favourable description, an objection of that or any other kind is fair, and that advantage may be taken of it in any stage of the cause. This Court is certainly not in the habit of inclining to objections of form in cases which are brought from the colonies—it is perfectly well known that they have not in all cases the means of observing that exactness which the rules of pleading in the courts of the mother country may require, and therefore great indulgence is shewn to some informality in that respect. At the same time, if it is essential that the fact should be proved, the want of proof of an essential fact must be attended to. It would be very inconvenient that an objection of this kind should be deferred to a very late stage of the appeal; though I do not say that it is then absolutely and universally inadmissible, or that the Court would refuse to entertain such an objection if brought

28 G. 3. c. 6.
L. 16.

brought forward at the eleventh hour, whether the case were of a favourable description or not. How it is to be considered in respects of that nature must depend on the result of the discussion of its merits; for till the Court has signified Its opinion upon those merits, *non constat* that it is to be attended with any considerations of a favourable nature. It is a case of forfeiture undoubtedly, but it is a revenue case of forfeiture, and the revenue laws, which are founded in a wise and salutary policy, are always upheld by a strict enforcement in those Courts which have to carry them into execution. In this case, however, I take the fact to be, that there is no foundation whatever for the principal objection, because not only does the party describe himself as *commander of a king's ship*, but I find an admission on the part of the claimant that he was so, in page 11, of the process, where it is stated, that "in the Court of Vice Admiralty in and for the
 " the said island, on the 9th day of *November 1807*,
 " the Honourable *Archibald Gloster Esq.* His Majesty's
 " Attorney General, and Advocate and Proctor for
 " *Daniel Tubbs* of *Boston*, entered a claim for the ship
 " and goods seized and now under prosecution in the
 " said Court,"—by whom?—"by *Alexander Briarly*,
 " Lieutenant in His Majesty's navy, and *commanding*
 " *His Majesty's ship of war Oronoko*."—Here is, on the part of the claimant, therefore, an admission that he was a person so authorized; it is not stated merely that he so described himself, but it is a direct averment of the fact on the part of the claimant himself; the parties have gone on ever since under that claim so entered and so admitted, and therefore it is impossible for me to attend to an objection of that nature. I must dismiss it altogether out of the cause.

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It does not appear that any libel was filed till the 19th of *October*, though the seizure was made on the 6th of *August*, and That is an irregularity, which among many other singularities that accompany this case, excites the observation of the Court, and renders it necessary to enquire how it comes about that this officer making his seizure upon the 6th of *August*, did not file his libel till the 19th of *October*. The fact must be accounted for, because otherwise it is an inactivity that might be fatal to his interests, and it is necessary for the Court to see whether from the history of the transaction, as far as it can be collected from this evidence, there is that course of events which shall discharge him from the objections that might arise from the tardiness of his proceedings. Now, how is it accounted for? According to the evidence he took possession of this vessel upon the 7th of *August*, and in page 32 of the process it appears that he made an application to the Collector of the Customs (to whose care, by the act of parliament the custody of seized vessels is given), upon the 8th of *August*, in these terms, “ I have seized the *American* ship *Adams*,
“ Capt. *Tubbs*, and the goods, wares, and merchan-
“ dizes on board of her, for a breach of the Revenue
“ and Navigation Laws. I have therefore to request
“ you will be pleased to take charge of the same
“ according to the Act.” He goes on to state—
“ I would wait on you personally, but indisposition,
“ and being *under close arrest by order of his Excellency*
“ *and Council*, prevent me.” So that at this time he was as active and urgent as he could be, for being himself imprisoned, he did every thing that it was in his power to do, in making his application to the proper officer. The officer of the customs, acting ministerially

ministerially in conformity to orders he had received from the Governor and Council, declined interfering in the business, and therefore there is no imputation upon Mr. *Briarly* for neglect of duty on that account.

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It seems (at least if the petition which states the course of the events, is to be considered as evidence) that this gentleman was for a considerable time afterwards—a month—detained in the common public gaol of the island by order of the Governor; for what this was done does not appear in the evidence transmitted. This *does* appear, that he *did* use a coarse and irreverent expression with respect to the permission which had been given by the Governor to land this obnoxious article, namely, that “*he did not care a damn about the Governor’s permission.*” This was certainly a gross manner of expressing his doubts upon the validity of the order under which these goods were landed; but it is impossible to conceive that this expression, though highly censurable in its terms, could have been the reason for such a proceeding against him, neither could the seizure itself have furnished a ground for his imprisonment. The acts of a Minister of the Crown are liable to be called in question; the subject has a right to take the decision of a Court of Justice upon any disputable act of the highest authority of the State, and therefore it cannot be for either of these acts, I should suppose, that this gentleman was put into the condition which he describes. It must have been for some reason or other that lies entirely out of the range of this evidence, and into which it is not proper for me to enquire any further than the necessity of his explaining the cause of the delay makes it incumbent upon me to do so. For any other purpose it is out of any view I can take of the question;

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and I look at it only so far as it is necessary for his exculpation in not having proceeded with greater activity in the cause. Now the fact being, that for some reason or other that lies out of sight, and which I am bound to believe to have been sufficient, (from respect to the personal character and official situation of the person who directed it,) the fact, I say, being that Lieutenant *Briarly* was under personal detention himself, and the officer of the Customs, to whom the authority was given having declined acting, he is not chargeable with fatal neglect under such an incapacity.

It appears, likewise, that a forcible repossession of this vessel was taken, upon the 10th of *August*; this is spoken to by two witnesses. One of them, a boatswain of the name of *Morgan* whom Lieutenant *Briarly* put on board, says, “ The ship was taken possession of
“ by Major *Logan*, a serjeant, and eight soldiers with
“ muskets and fixed bayonets, three days after the
“ seizure, and on the day the deponent was sent
“ out of her; and Major *Logan* said that he took
“ charge of the ship by the Governor’s orders, and
“ asked the deponent what charge he had of her;
“ that the deponent informed him that he was in
“ charge of the said ship by the orders of Mr. *Derick-*
“ *son*, Master of the *Oronoko*, to see that the said ship
“ *Adams* was regularly pumped out, and not to
“ suffer any thing to be taken out of her; that Major
“ *Logan* told him he must go on shore with him, and
“ the deponent asked if he could not go to his own
“ ship, and Major *Logan* answered yes, and that he
“ might either go on board his own ship or on shore
“ with him; that Captain *Tubbs* ordered two of his
“ men to put the deponent on board the *Dominica*
“ packet,

“ packet, and he was accordingly taken on board
 “ of her, as there was a boat alongside of her from
 “ the *Oronoko*.” There is another witness to this
 point, *Thomas Cushing Faxton*, and the account he
 gives is, “ That, in the month of *August* last, Major
 “ *Logan* came on board the ship *Adams*, with a ser-
 “ jeant and eight white soldiers, while she was under
 “ seizure by Lieutenant *Briarly*; that the deponent
 “ was on board at the time of their arrival; that
 “ Major *Logan* told the boatswain that he was sent
 “ to take charge of the ship, and he, the boatswain,
 “ had nothing further to do with her, and might go
 “ on board his own vessel as quick as he could, and
 “ a boat belonging to the *Adams* was ordered, and
 “ took him on board the *Dominica* packet; that some
 “ orders were given respecting the ship *Adams*, but
 “ does not recollect the purport of them, but he
 “ remembers that Major *Logan* told the Serjeant to let
 “ Captain *Tubbs* go on and to continue to discharge
 “ the tobacco, and not to let any boats come along-
 “ side, unless by Captain *Tubbs*’s orders.”

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It appears that this vessel, being again put into the possession of Captain *Tubbs*, in consequence of this forcible re-possession by the military force, there followed afterwards an application to the Judge of the Court on behalf of Captain *Tubbs* made upon the 1st of *September* 1807, stating that his cargo was then all delivered, and that he desired leave to depart. The answer given by the Judge was, that no proceeding had, at that time, been commenced in his court; that there was nothing to detain him there, and that, therefore, he was at liberty to depart. And it does appear accordingly that he did depart; the ship went about her business, and without any bail being given,

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Mr. *Briarly* afterwards, upon the 19th of *October*, filed his information, and prayed that bail might be assigned. The Judge rejected the application for bail, because he said he had no jurisdiction, the ship being gone, and that no cause having been commenced while the ship staid there, there was nothing upon which the Court could then act. It happened, however, that this same ship returned to the port, and then Lieutenant *Briarly* applied to the Judge for his authority to arrest her. That authority was accordingly communicated on the 29th *January* 1808, and I think rightly communicated, because Lieut. *Briarly* having taken legal possession of the ship in the first instance, and forcible re-possession having taken her from him, I think his legal possession was not divested by that forcible re-possession, and that, therefore, the legal authority of the Court was very properly imparted to him, for the purpose of putting him in *statu quo*, into the exact state in which he would have been if that force had not been applied to him. The ship was accordingly arrested, and bail ordered for the alledged value of the ship and the former cargo.

There was then an application made to the Court to proceed to the hearing of the cause on the claim given, the evidence being closed. But it appears that the cause was not heard till six months afterwards in consequence of the application of the Custom-house officers, who stated that their orders from the Custom-house in *England* were, that causes in which they were parties *should not be heard till they had directions from home, if possible; always preserving due obedience to the orders of the Court in which the proceedings were had.* I dare say there were reasons, and that a very justifiable discretion exercised upon those reasons, then guided the determination of the judge to delay

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the cause for so long a period. I have no doubt of it; but, at the same time, it is not to be said that if a private seizer makes a seizure and is willing to proceed with his cause, the cause is necessarily to be suspended for six months, till orders can be received from the Custom House here. Because that seizer is proceeding *pro interesse suo*; he has a right so to proceed, and it is at his expence and peril. The ground for that direction, assigned by the commissioners here, is, that improper expences may not be incurred on behalf of the king's government. But if the suit is going on not at their expence, but at the private charge of the private seizer, there is no reason why he should be delayed in the prosecution of it. I do not mean to impute blame. I have no doubt the delay was properly interposed.

A *noli prosequi* being entered by the Attorney General, proceedings were had upon that point, and the *noli prosequi* dismissed so far as respected the interest of Lieutenant *Briarly*, the cause as prosecuted by him came to a hearing, and upon that hearing the judge restored the ship and the cargo entirely.

The cause being regularly appealed, it is now for me to consider what is to be the event of that appeal. The breach assigned, and the only one worthy the attention of the Court, is the importation of tobacco, and to prove this importation of tobacco these facts are established. First, that it was brought to the island of *Trinidad* in this ship, not being *British* built or navigated as such, but an *American* ship; secondly, that it was there put into a boat for the purpose of being landed and warehoused; and thirdly, that it was finally landed and warehoused. The last

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of these facts, that it was finally landed and warehoused, is not necessary to constitute the importation; because undoubtedly the putting into the boat with the intention of being landed, is an importation. The bringing goods *in a ship* is *prima facie* evidence of importation; it may be repelled; but the act of putting them into a boat from the ship with the avowed intention of landing them, is undoubtedly all that is necessary to compose and to conclude a case of importation; and therefore, I think, I must take it that, in this case, there is sufficient proof of the fact of the importation of this tobacco.

This fact is attempted to be justified in the case, and the rights and the interests of the party in this property must depend upon the nature of the justifications that have been set up. It has been said, in the first place, and very strongly insisted upon, that here was a perfectly *bona fide* intention; that it is clear there was no intention to violate the law, because an application was first made to the governor—that permission was given by him, and it was intended to be landed openly and in the face of day, without any act of smuggling as far as clandestinity is necessary to constitute an offence of that species. In the first place, it is not necessary that there should in all cases be *mala fides* to subject to forfeiture, because an irregular importation made under ignorance or error, if ignorance and error be not invincible, works a forfeiture, and is quite sufficient for that purpose. If you break the law, whether you do it clandestinely or openly and avowedly, the intention of violating the law is a legal and implied ingredient in the act done, and the Court is not required to look further than to the act itself.

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But I must say, that if it were requisite to look further, I cannot but think that something of an apparent *mala fides* does occur in this case, for I can by no means agree to the representations which have been made of that clear purity of intention in the importers, who, are to be considered as the violators of the law—I mean the *British* merchants, Mr. *Niblett* and Mr. *Swinden*. For what is their conduct? In the petition which is contained in page 60, they state to the governor, “That they have imported in
 “the *American* ship *Adams*, from *Boston*, twenty-five
 “hogheads of tobacco, which they contracted for in
 “*April* last, at which time the said article *was allowed*
 “*to be imported in American bottoms*, and no intima-
 “tion of its being prohibited.” Now, how is it possible to assert *that* with any attention to the dates of the order of the king in council, which had been received and published at the government-house at *Trinidad* months before; for this petition bears date on the 5th of *August* 1807, and the order in council was published at the government-house at *Trinidad* upon the 21st of *November* 1806, in which there was allowed the importation of provisions. But under which allowance, tobacco (unless tobacco in the circumstances I shall have occasion to advert to, can be considered as provision) was publicly and notoriously a prohibited article; for every thing not *expressly* permitted must be taken to be *prohibited* under the general statutes of exclusion. How therefore it can possibly be asserted by them that they contracted for this tobacco at a time when it could be legally imported, I really cannot conjecture. They go on to state in this petition, “that, being informed there is some restriction at this time;”—(why there was no
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other restriction than that which existed at the time of their entering into the contract,) — “ your petitioners
“ trust that your excellency will take the circum-
“ stance into consideration, and allow the same to
“ be landed, otherwise” — What? “ *otherwise it would*
“ *prove of serious injury to them?*” that is, they would
be losers by it.

Now, I have found great difficulty in reconciling this averment with the other averment which I find upon oath in the deposition of one of these gentlemen (Mr. *Swinden*) afterwards, in page 60 of the process, in which he expressly swears, in answer to the second interrogatory, “ that he is no further inter-
“ rested in the condemnation or acquittal of the ship or
“ cargo, than that he assisted Mr. *Faxon* as acting on
“ behalf of Captain *Tubbs*; that *he has no interest*
“ *whatever in this ship or in this cargo;*” having nevertheless stated in the petition that the being prevented landing this article *would be a most serious injury to him.*

As to the pretence which has been set up that this tobacco came merely as other goods do for re-exportation, and that on application for leave to the governor, it was permitted to be landed there; it is perfectly clear that in reality this was only for the purpose of facilitating the importation; for they admit from the beginning that *they meant to import*; and this therefore was only the vehicle for that importation. The mode in which it was to be imported was this (and it was a contrivance for that purpose only) the tobacco was to come there openly as for re-exportation, and then, upon leave applied for by them and given by the governor for the importation, it was to be imported. But no re-exportation entered into the minds of the persons who
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were parties to this business ; it is evident that their original intention was importation only, first taking these steps for the sole purpose I have stated. I am therefore clearly of opinion, that there is nothing of *bona fides* in this case (to say the least of it) that challenges any peculiar consideration towards these parties.

The next justification which has been set up, and which is of a very grave kind, is, that authority was given by an actual permission to land these goods by the governor and council, and afterwards (as it is pleaded) by the custom-house officer. Now the conduct of the custom-house officer certainly adds nothing to the authority, because it is perfectly clear that Mr. *Grant*, conceiving he was bound in duty to obey the governor and council, did not confirm those orders, but acted merely in conformity to them ; and if the act is not legalized by the governor, still less will it be so by the obedience the officer felt himself bound to give to the act of the governor. The case therefore is confined to the authority of the governor, acting by the advice of his council ; and upon *that* the question comes to this, (which is a constitutional question in the colonies of considerable extent undoubtedly.) namely, What authority the governor had to grant a permission for the landing of articles not permitted by law to be imported ?

That a governor generally has no such authority I think is most clear, both upon general principles, and likewise upon the history of the laws that apply to this particular subject. Upon all general principles *surely not*, because it would amount to a power of dispensing with the acts of parliament, which the constitution of this country does not allow to the sovereign

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sovereign himself. Nobody contends that the crown even here can legally permit articles to be imported which are excluded by statute, unless where a discretion is vested in the crown by statute. If such permission *is* given (which pressing occasions may undoubtedly call for), it requires an indemnity for those who advise, and for those who carry it into execution, for it is an undoubted violation of the law in every instance in which it occurs; and it never can be said, that the derived authority of a governor under the Crown can be less restricted than that of the Crown itself in the use of its prerogative upon such matters.— So much for general principle.

34 G. 3. c. 35.

Upon the particular history of the laws, applying to this subject, how does the case stand? It is matter of perfect notoriety, that owing to the difficulty of obtaining supplies during the war, it had been the practice of the governors of the colonies to permit the importation of such articles as were really necessary for the subsistence of the inhabitants of their several settlements. They have been in the habit of granting such permissions; but it is matter of equal notoriety, that acts of parliament were regularly passed, in order to indemnify the governors for having so acted in breach of the law; and those acts have at the same time most explicitly recognized that such permissions have no validity whatever in law. What is the language of all those particular acts of indemnity? It is, “Whereas, under necessity, “governors have permitted certain articles to be “landed; the same, on the ground of necessity, “*ought* to be justified by an act of parliament, and “*rendered valid* and of due force in law;” Plainly admitting that, without a statute applied, they would be

be of no force in law whatever. And a fundamental provision made is, "that all actions already commenced shall be stayed," evidently again admitting, that prosecutions might be commenced on account of those breaches of the law. Such a provision as this occurs in every one of those acts, manifestly recognizing that parties might sue and might recover the penalties, and do every thing which can be done; where a law has been infringed for the recovery of the penalties given by statute for those infringements.

Since that time, another policy has been adopted by the statute of the 46th of his present majesty. 46 G. 3. c. 111. When this subject came to be reconsidered it was thought extremely unadvisable that this irregular and somewhat unseemly practice should be continued, and another policy was adopted, and this policy was that the crown, which had not the power before, should now have an authority conferred upon it of directing the governors of the several colonies to permit such and such articles to be imported. But the act of parliament which introduces and establishes this policy most expressly recognizes, that all that had been done by the governors without such an authority as this being communicated to them, was a violation of the law, for it begins in this manner: "Whereas
 " it is necessary that provision should be made for
 " meeting such emergencies in future, without the
 " necessity of frequent violations of the law by his ma-
 " jesty's officers appointed and sworn to administer
 " and execute the same;" treating therefore what the governors had done as manifest violations of the law, and to be justified only by necessity. This is a recognition that they are violations of the law in every instance in which they occur; one is not more a violation of the law than another; it is not the frequency that makes the violation, but it is a violation

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in every instance. It is so considered by this statute, the object of which it is evident was to prevent violations of the law, not to continue them—and to confine the power of making provisions for such occasions to his majesty and his council; taking away from the governor and his council, (if that can be said to be taken away which they never had), a power which they did not possess, but which they had exercised and taken upon themselves to exercise under circumstances of apparent necessity. I cannot help thinking, that if under the state of the law as now modelled a power of that sort is assumed, it is a more direct breach of the law than even before, for as it stood formerly, the authority was not possessed anywhere, no provision was made for its existence or exercise, and if it could be said to exist it existed just as much in the governor as the crown, for in truth it existed in neither. But now it is vested *exclusively* and *positively* in the crown, therefore here is now an additional obligation on the part of the governor not to trespass on that power which the wisdom of the state has confided exclusively to the discretion of the crown; here is now an additional ground upon which the illegality of such an act is to be considered as still more substantially founded.

His majesty has as far as this particular case is concerned acted upon the authority so communicated to him by certain public orders conveyed to the governors of the plantations, containing therein an enumeration of the articles, which under the exercise of his authority he permits to be imported, notwithstanding the prohibitions of the statute, and by this enumeration they are unavoidably bound, they cannot travel out of it a hair's breadth. I do not say that occasions may not arise, in which mere political responsibility

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sponsibility might be satisfied upon a deviation of this nature, but legal responsibility certainly cannot. If facts of this kind, though done under an adequate political responsibility, are examined in a Court of Justice into which they are brought by any person having a right to bring them into such court of justice, the permission of any other, except of that personage who is authorized by express words of the statute to grant it, must be considered as giving no force whatever to any thing done under such permission.

In this particular case tobacco is not found among the articles permitted by such authority as the *Law* under this explanation can alone respect, unless it is found under the description of *provision*; and I cannot think that it is found there, either in the nature of the thing itself, or in the understanding of the parties. By provision in the statute, is to be understood *human-food*—that which contributes to the sustenance of the body. The use of tobacco in this island, as far as one can collect from the evidence, is principally for smoking, and there is much talk of the manufacture of segars, and the extreme use of it to the natives and the slaves in the rainy season. But supposing it to be applied in the other way—of mastication, bringing it nearer to the application of food, I think it is not liable to be so considered, either physically or legally. It is a plant of the narcotic kind, which removes appetite by acting as narcotics do, by deadening the faculties of the stomach, but not by conveying nutriment; it is not alimentary in any degree, and is not so considered. It is indeed, I understand, here supplied by the Victualling Board to the Navy, but not as provision in any other sense than that it is *provided*—not in the real intelligible use of the

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word as nutriment. It is known that in this *use of it* the extract is generally rejected from the mouth—not taken into the stomach, and if casually received there, it is received not as matter of nutrition. It may be an article of luxury, and in persons of certain habits of life, becomes an article of necessity, and may be salutary in some of its effects; but it is not provision in the sense of food, it is not that which is understood to convey nourishment to the body, though as a narcotic it may sometimes render the use of food unnecessary. Most clearly, in the understanding of all the parties, it was not considered as provision; for if so, how comes it that a particular permission was applied for; that these certificates of merchants were obtained; and that this authority for importation was finally granted. All these steps were perfectly unnecessary, if tobacco was comprised under the description of the licensed article *Provisions*. They prove, beyond all contradiction, that all the parties in this transaction took a view utterly inconsistent with any such pretension.

The next principle which has been resorted to in justification of this act is, that though the Governor has not generally (and it can hardly be argued that he generally has) a power of importation, yet that he has in cases of necessity. And I must admit that in cases of great and imperious, and what I may describe as tyrannical necessity (and that demonstrated by clear and irresistible evidence) the Court will strain hard to give to the parties even in the administration of these unbending laws, the benefit of those maxims, in which the common sense and feelings of mankind have always acquiesced.—*Necessity has no law, necessitas quicquid cogit defendit. Nemo tenetur ad impossibile*—it would be inhuman for a Court of Justice to say, that it is by these laws to bind human creatures to the

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miseries of famine. Whether such a necessity could be pleaded or not, in respect of an article of mere luxury, is a question I will not enter into, probably it might, if that which originally was considered as an article of mere luxury was converted into an article of necessity. But I must accompany this with the observation that the existence of the necessity, must be pleaded and proved to the satisfaction of the Court which is to examine the plea and the proof. I cannot admit that the Court is to take that upon the authority of the Governor, and to consider the act of the Governor as conclusive evidence of the existence of the necessity. I am inclined to give to persons in that honourable situation every presumptive conclusion; but the Court must have the evidence in support of such a plea, and a fair and candid view of that evidence with its own eyes, before it can receive it for any legal purpose whatever.

In the next place I say, no such necessity is in this case alledged, as far at least as the importation of the tobacco is concerned, for what does the petition of the merchants state in this case? I have observed already that all they state is, "*that they would be losers;*" they state no distress of the colony on that account, but only that if this tobacco is not permitted to be imported they individually would be injured. Then follows a certificate of the merchants, which certainly is far from shewing any thing like that publick necessity. It is to be found in page 32, and is to this effect, "We, the undersigned merchants of the port of *Spain*, give it as our opinion that the landing of the said tobacco," What?—Is necessary to the safety of the colony or the preservation of the inhabitants? No—but that it "*will be of no detriment to the British trade.*" This consideration, I perceive, has found its

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way into the act of the Governor, for there is written upon it "Granted, provided the tobacco is unmanufactured;" and it is also introduced into the sentence of the Judge of the Court below, who observes, "That the permission to import unmanufactured tobacco will not injure the *British* trader." Now certainly grounds of commercial policy will never legalize such an act if those grounds were ever so solidly founded and clearly made out. On the best consideration I can give to this evidence, I should very much doubt whether I could venture so to characterize them, for I see this clearly, that the effect of this indulgence is to give a very great and preponderating advantage to the *American* merchants in this trade over the *British*. It appears upon the evidence of Mr. *Hudson* and Mr. *Grant*, that in two months, from the 1st of *June* to the 10th of *August*, 30 hogsheds only were imported by the *British* merchants, and 76 by the *Americans* under permission of the Governor. It is perfectly clear (if I allowed myself to form a judgment upon this evidence alone) that the result of this must be to drive the *British* navigation out of the markets of this island, in direct contravention to the policy of the system of the Navigation Laws. However, I am too well aware of the want of local information upon such a subject to entertain any other than a very diffident opinion upon it, and therefore, I am perfectly prepared to suppose that those persons who have a much more intimate and comprehensive view of the subject may be better qualified to form correct judgments upon grounds of commercial policy—But I must add that if these judgments upon which the acts of the Governor have proceeded were most unimpeachably correct, they would not sustain the acts which have taken such grounds for their legal basis. If there are such grounds of policy that

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that call for the admission of such articles, what is the course pointed out by the law?—to represent these grounds to the King, and to leave the judgment of commercial policy, where the law has placed it, and to act under orders emanating from the royal authority itself.

In the next place, I say, that if there is no necessity alledged, still less is there a necessity *proved*. In fact, the contrary is proved in this case. It is stated in the evidence of one of these merchants, who were called for the claimant, “that 60 hogheads of tobacco is the average consumption for six months,”—that is ten hogheads a month. Now, between the 1st of *June* and the 10th of *August* it appears that there were 106 hogheads imported, and none exported; that is proved by the collector of the customs; and several merchants prove that they had large quantities on hand; that the importation was far beyond the average consumption, and that there had been a rise only of twenty-five per cent. in point of price. If there was any real distress or urgency that could create an alarm or amount to a necessity, it certainly does not appear upon the evidence to which I must confine myself; what might be matter of notoriety in the island, or matter of local feeling, is out of the question, because it is out of sight. Confining myself to this evidence, I see no reason whatever for believing it.

Another ground which has been resorted to, has been an address rather to the *misericordia* of the Court, on account of the probable ignorance of a foreign captain, coming in, not acquainted with the law, and misled by the Governor, the extent of whose authority he could not accurately define. To this it is an obvious answer, that whoever trades with a country, be he a foreigner or not, is bound to know the laws of

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of that country with which he trades, as far as they concern his own acts, be the nature of those laws and the extent of them what they may. If he trades under the advice even of a skilful practitioner of the law, and that advice proves erroneous, I fear that it is an indispensable principle of the law that it will not protect him from forfeiture. If he trades under an authority that is insufficient, it will not protect him, because he is as much bound to know the extent of that authority, relatively to himself in that act of trading, as he is to know any other circumstance that is required to constitute the legality of the act.

But I consider not so much in this case the *American* master, as the importers—those *British* merchants who knowingly entered into a contract at a time when it was clearly illegal, who surprised the vigilance, and in some measure abused the honourable intentions of the Governor, and led on this *American* captain into what I am legally bound to consider as a violation of the law.

Having considered this case with much attention, not only to its own merits, but likewise to that which is due to the official situations, and to the honourable characters of the persons under whose authority the act in question has been done, I feel myself under the necessity of declaring, that it is in my apprehension to be considered as an illegal act, and incurring the penalties which are created by the statute. The question then remains, What are those penalties? The proceeding is certainly upon the old Navigation Law, which would embrace the whole extent of the forfeiture of the ship, and the entire value of the cargo. But, I am of opinion, that the parties, being *American*, are entitled, by the Intercourse Act, to a moderation of those penalties; and that it having been determined

determined that, by the provisions of that Intercourse Act, (the act which regulates the intercourse between the subjects of the United States and His Majesty's subjects) the penalty shall extend only to the forfeiture of the ship, and the noxious articles they have a right to have that benefit; this being a proceeding under the Navigation Laws, which *quo ad hoc* must be considered as they respect the *Americans*, so far in a state of suspension. It was contended that the fish were liable to be considered as noxious articles. I think they are not to be so considered, for it appears that the prohibition of fish had not arrived when this transaction took place; the parties came under an invincible ignorance, which must excuse them, and, therefore, the confiscation cannot extend to that article. The tobacco is liable to forfeiture, and the ship likewise, and as such, therefore, I must condemn them. I affirm the sentence with respect to the other parts, and condemn the ship and the twenty-five hogheads of tobacco; and I think I should not give the seizer that protection which this Court ought to afford him, if I did not give him his costs in both Courts.

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JUDGMENT.

SIR William Scott.—This was the case of an *American* vessel which was taken on the 15th *November* 1810, on a voyage from *Boston* to *Cherbourg*. It is contended, on the part of the Captors, that, under the Order in Council of 26th *April* 1809, this ship and cargo, being destined to a port of *France*, are liable to confiscation. On the part of the Claimants it has been

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been replied, that the ship and cargo are not confiscable under the Orders in Council; first, because these Orders have in fact become extinct, being professedly founded upon measures which the enemy had retracted; and secondly, that if the Orders in Council are to be considered as existing, there are circumstances of equity in the present case, and in the others that follow, which ought to induce the Court to hold them exonerated from the penal effect of these orders.

In the course of the discussion a question has been started, What would be the duty of the Court under Orders in Council that were repugnant to the law of nations? It has been contended on one side, that the Court would at all events be bound to enforce the Orders in Council: on the other, that the Court would be bound to apply the rule of the Law of Nations adapted to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the Law of Nations, however liable to be so described if merely original and abstract. And therefore it is rather to correct possible misapprehension on the subject, than from the sense of any obligation which the present discussion imposes upon me, that I observe that this Court is bound to administer the Law of Nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time it is strictly true, that by the constitution of this country, the King in Council

cil possesses legislative rights over this Court, and has power to issue orders and instructions which It is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the Law of Nations, and that It is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these Orders and Instructions are presumed to conform themselves, under the given circumstances, to the principles of Its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself; or they are positive Regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this Court, relatively to the legislative power of the King in Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculations. What would be the duty of the individuals who preside in those Courts if required to enforce an Act of Parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition

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position that any such will arise. In like manner this Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law.—In the particular case of the orders and instructions which give rise to the present question, the Court has not heard it at all maintained in argument, that as *retaliatory* orders they are not conformable to such principles—for *retaliatory* orders they are.—They are so declared in their own language, and in the uniform language of the Government which has established them. I have no hesitation in saying, that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory, from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate.

The first question is, what is the proper evidence for this Court to receive, under all the circumstances that belong to the case, in proof of the fact that He *has* made a *bona fide* retraction of those measures. Upon that point it appears to me that the proper evidence for the Court to receive, is the declaration of the State Itself, which issued these retaliatory orders, that It revokes them in consequence of such a change having taken place in the conduct of the enemy. When the State, in consequence of gross outrages upon the law of nations committed by Its adversary, was compelled by a necessity which It laments, to resort to measures which It otherwise condemns, It pledged Itself to the revocation of those measures as soon as the necessity ceases.

ceases.—And till the State revokes them, this Court is bound to presume that the necessity continues to exist. It cannot, without extreme indecency, suppose that they would continue a moment longer than the necessity which produced them, or that the Notification that such measures were revoked, would be less public and formal than their first establishment. Their establishment was doubtless a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility, but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy. It would not have been within the competency of the Court Itself to have applied originally such rules, because it was hardly possible for this Court to possess that distinct and certain information of the facts to which alone such extraordinary rules were justly applicable. It waited therefore for the communication of the facts: It waited likewise for the promulgation of the rules that were to be practically applied; for the State might not have thought fit to act up to the extremity of its rights on this extraordinary occasion. It might, from motives of forbearance, or even of policy unmixed with any injustice to other States, have adopted a more indulgent rule than the Law of Nations would authorize, though It is not at liberty ever to apply a harsher rule than that Law warrants. In the case of the *Swedish* convoy, which has been alluded to, no order or instruction whatever was issued, and the Court therefore was left to find its way to that legal conclusion which Its judgment of the principles of the law led It to adopt. But certainly if the State had issued an Order that a rule of less severity should be applied, this Court would not have considered it as any departure from Its duty to act upon

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upon the milder rule which the prudence of the State was content to substitute in support of Its own rights. In the present case It waited for the communication of the fact and the promulgation of the rule. It is Its duty in like manner to wait for the notification of the fact that these orders are revoked in consequence of a change in the conduct of the enemy.

The edicts of the enemy themselves, obscure and ambiguous in their usual language, and most notoriously and frequently contradicted by His practice, would hardly afford It a satisfactory evidence of any such change having actually and sincerely taken place. The State has pledged itself to make such a notification when the fact happens : It is pledged so to do by Its public Declarations—by Its acknowledged interpretations of the Law of Nations—by every act which can excite an universal expectation and demand, that It shall redeem such a pledge. Is such an expectation peculiar to this Court? most unquestionably not. It is universally felt and universally expressed. What are the expectations signified by the *American* Government in the public correspondence referred to? not that these Orders would become silently extinct under the interpretations of this Court, but that the State would rescind and revoke them. What is the expectation expressed in the numerous private letters exhibited to the Court amongst the papers found on board this class of vessels? not that the *British* Orders had expired of themselves, but that they would be removed and repealed by public authority. If I took upon myself to annihilate them by interpretation, I should act in opposition to the apprehension and judgment of all parties concerned—of the individuals whose property is in question, and of the *American* Government Itself, which is bound to protect them.

Allusion

Allusion has been made to two or three cases, in which this Court is said to have exercised a power of qualifying and moderating the general terms of an Order in Council, as in the case of the *Lucy, Taylor*, in which the general terms of the order, subjected to confiscation *all* Ships transferred by the enemy to neutrals during the war, and yet this Court held that these general terms did not extend to *prize Ships* so transferred by the enemy. But what was the ground of that interpretation? It was this—The rule itself was adopted from the rule of the enemy, and upon a principle of exact retaliation; for it was declared in the express terms of the preamble of the Order, that it was *just to apply the same rule to the enemy which he was in the habit of applying to this country*. And when the Court found upon satisfactory evidence, that the enemy did not apply any such rule to *prize ships*, but specially exempted them, It would have pronounced, in direct contradiction to the avowed principle of the order itself, if It had not followed the enemy in this acknowledged distinction. It has likewise been urged that cases may be found in which the Court has presumed a revocation, though no such revocation has been promulged. And it is certainly true that where an essential change in the circumstances that occasioned the order has, in effect, extinguished its subject matter, and that change of circumstances has been publicly declared by the State, the Court has not thought it necessary to wait for a formal revocation itself. In the case of the *Baltic Order*, by which, in compliance with the wishes of Its allies in the war, the Government of this country granted an immunity from the molestation of capture in that sea; the Court held that order to be revoked when the state had declared that most of those States

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to whose applications, as allies, that indulgence had been granted, had changed the character of allies for that of enemies. It was quite unnecessary to wait for such special revocation when by the general declaration of war all hostilities had been authorized against them.

Admitting, however, that there may be cases of presumed revocation, does it follow that this is, with any propriety, to be considered as one of those cases? The novelty of these Orders in Council—the magnitude—the complexity—the extraordinary nature of the facts to which they owe their origin—the attention which they called for and excited both at home and abroad—the pledges given by this State and accepted by other States, all disqualify this Court from taking upon Itself to apply a presumed revocation in any such case.

Supposing, however, that the Court felt itself at liberty to accept as satisfactory other evidence of a sincere retraction of the French Decrees, what is the amount of the evidence offered?—No edict—no public declaration of repeal—no reference to cases in which the courts of that country have acted upon any such revocation. The only case mentioned was that of the *New Orleans Packet*, and it was brought forward in such a way, so void of all authenticity, and of all accurate detail of particulars, as to make it hardly possible for me to allude to it with any propriety, and much less with any legal effect. What the circumstances of that case were, in what form, and under what authority, and on what account released, did not at all appear—Whether at all applicable to the present question, whether a mere irregularity, or what was its real character, the Court could not learn. This however is matter of notoriety, that these Decrees are pronounced fundamental laws of the *French Empire*—that they were declared so in their original formation—
—and

—and that they have been since so declared repeatedly and recently—long since the date of the present transactions. The declaration of the person styling himself Duke de *Cadore* imports no revocation; for that declaration imports only a conditional retraction, and this upon conditions known to be impossible to be complied with. It has been urged that the *American Government* has considered it otherwise, and has so declared it for the regulation of the conduct of the people of that Country. If such is the fact, it is not for me to lose sight of that respect which is due to the acts of a foreign government so far as to question the propriety of any interpretation which they may have given to such an instrument. But when the effect of such an instrument is pressed upon me for the purpose of calling for my decision, I must be allowed to interpret it for myself, and to act upon that interpretation. And to me it appears, that the declaration, clogged as it is with stipulations known to be beyond the reach of all rational hope of any possible compliance, is in effect a renunciation of any serious purpose of repealing those decrees. I think I might invoke the authority of the government of the *United States* for denying to this *French* declaration the effect of an absolute repeal, when I observe that the period which they have allowed to the *British Government* for revoking our Orders in Council extends to the 2d of *February*—an allowance which could hardly have been made if the revocation on the part of *France* had really taken place at the time to which that declaration purports to refer.

In the absence of any declaration of the *British Government* to such an effect, there is a total failure of all other evidence, (if the Court were at liberty to accept other evidence as satisfactory), that the *French decrees* had been revoked. If I were driven to de-

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cide upon that evidence, independent of all evidence to be regularly furnished by the Government under whose authority I sit, I think I am bound to pronounce that no such revocation has taken place, and therefore that the Orders in Council subsist in perfect justice as well as in complete authority.

It is incumbent upon me, I think, to take notice of an objection of Dr. *Herbert's*, to the *existence* of the Orders in Council—namely, that *British* subjects are, notwithstanding, permitted to trade with *France*, and that a blockade which excludes the subjects of all other countries from trading with ports of the enemy, and at the same time permits any access to those ports to the subjects of the State which imposes it, is irregular, illegal, and null. And I agree to the position, that a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the State which lays on such blockade, is illegal and void on the very principle upon which it is founded. But, in the first place, (though that is matter of inferior consideration), I am not aware that any such trade between the subjects of this country and *France* is *generally* permitted. Licences have been granted certainly in no inconsiderable numbers; but it never has been argued that particular Licences would vitiate a blockade. If it were material in the present case, it might be observed, that many more of these Licences had been granted to Foreign ships than to *British* ships, to go from this country to *France*, and to return here from thence with cargoes. But, secondly, what still more clearly and generally takes this matter out of the reach of the objection, is the particular nature and character of this Blockade of *France*, if it is so to be characterized. It is not an original, independent act of Blockade,

to be governed by the common rules that belong simply to that operation of war. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. *France* declared that the subjects of other States should have no access to *England*; *England*, on that account, declared that the subjects of other states should have no access to *France*. So far this retaliatory Blockade (if Blockade it is to be called) is co-extensive with the principle: Neutrals are prohibited to trade with *France*, because they are prohibited by *France* from trading with *England*. *England* acquires the right, which It would not otherwise possess, to prohibit that intercourse, by virtue of the act of *France*. Having so acquired it, It exercises it to its full extent, with entire competence of legal authority: and having so done, it is not for other Countries to enquire how far this Country may be able to relieve Itself further from the aggressions of that Enemy. The case is settled between them and Itself by the principle on which the intercourse is prohibited. If the convenience of this country before this prohibition required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed upon them on a ground so totally unconnected with the ordinary principles of a common measure of blockade, from which it is thus distinguished by its retaliatory character.

The last question is, Are there any circumstances addressed to equitable consideration, that can relieve the claimants from the penal effects of these Orders? Certainly, if any could be urged that arose from the conduct

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conduct of the *British* Government Itself, they might be urged with a powerful and even irresistible effect; but if they found themselves in the fraud of the enemy, or in the misapprehensions of the *American* Government induced by the fraud of the enemy, they found no claim on the *British* Government or on *British* tribunals. In the one case they must resort for redress to a quarter where, I fear, it is not to be found—to the Government of the enemy: in the other, where, I presume, it is to be found—to the Government of their own country.

Upon the declaration of the *American* Government, I have already said as much as consists with the respect which I am bound to pay to the declaration of a foreign Government professedly neutral. The custom-houses of that country, say the claimants, cleared us out for *France* publicly, and without reserve. They did so; but they left the claimants to pursue all requisite measures for their own security, in expectation I presume, that they would inform themselves, by legal inquiry, whether the blockade continued to exist, if its continuance was uncertain. That it was perfectly uncertain in their own apprehensions, is clear from the tenor of these letters of instructions to the different masters of these vessels. In these Letters, which are numerous, all is problematical between hope and fear—a contest between the desire of getting first to a tempting market on the one side and the possible hazard of *British* capture on the other; and it is to be regretted that the eagerness of mercantile speculation has prevailed over the sense of danger. In such a state of mind, acting upon circumstances, the party must understand that he takes the chance of events—of advantage, if the event which he hopes for has taken place, and of loss if it has not. It is his own adventure,

and he must take profit or loss as the event may throw it upon him. He cannot take the advantage without the hazard of loss, unless by resorting to *British* ports in the Channel, where certain information may be obtained, on the truth of which all prospects of loss or profit may safely be suspended. On the *British* Government no responsibility can be charged.—They were bound to revoke as soon as they were satisfied of the sincere revocation of the *French* decrees. Such satisfaction they have not signified, and I am bound to presume that no such satisfaction is felt.—With respect to the demand of warning, the orders themselves are full warning. They are the most formal admonitions that could be given—and being given and unrevoked, they require no subsidiary notice.

On the grounds of the present evidence, I therefore see no reason to hold the claimants discharged; but I do not proceed to an ultimate decision upon their interests, till I see the effect of that additional evidence which is promised to be produced upon the fact of the *French* retraction of their Decrees, said to have been very recently received from *Paris* by the *American* Charge D'Affaires in this country. Having no official means of communication with Foreign Ministers, I shall hope to receive the information in a regular manner, through the transmission of the *British* Offices of State,

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JUDGEMENT RESUMED.

Sir *William Scott*.—As the Claimants have failed to produce any evidence of the revocation of the *French* Decrees, and have nothing to offer as the foundation of a demand for further time, I must conform to what I declared on a former day, and proceed to make the decree

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decree effectual.—I should certainly have been extremely glad to receive any authentic information tending to shew that the decrees of *France*, to which these Orders in Council are retaliatory, had been revoked; and it was upon a suggestion offered on the part of the claimants, that dispatches had been very recently received from *Paris* by the *American* Minister in this Country, by which the fact might be ascertained, that the Court on the former day deferred its final judgement. It would have been unwilling to proceed to the condemnation of these vessels, without giving the proprietors the opportunity of shewing that the *French* decrees, on which our Orders in Council are founded, had been revoked. But they admit that they have no such evidence to produce; the property of the ships and cargoes is daily deteriorating, and it is my duty to delay no longer the judgement which is called for on the part of the captors.

From every thing that must have preceded, and from every thing that must have followed the revocation of the *French* Decrees, if such revocation had taken place, I think I am justified in pronouncing that no such event has ever occurred. The only document referred to on behalf of the Claimants is the letter of the person styling himself *Duc de Cadore*. That letter is nothing more than a conditional revocation: it contains an alternative proposed—either that *Great Britain* shall not only revoke her Orders in Council, but likewise renounce her principles of blockade, principles founded upon the ancient and established Law of Nations; or that *America* shall cause her neutral rights to be respected; in other words, that she shall join *France* in a compulsive confederation against this Country. It is quite impossible that *England* should renounce her principles of blockade to adopt the
new

new fangled principles of the *French* Government, which are absolute novelties in the Law of Nations; and I hope it is equally impossible that *America* should lend herself to an hostile attempt to compel this country to renounce those principles on which It has acted, in perfect conformity to antient practice and the known Law of Nations, upon the mere demand of the person holding the government of *France*. The *casus fœderis* therefore, if it may be so called, does not exist; the conditions on which alone *France* holds out a prospect of retracting the Decrees, neither are nor can be fulfilled. Looking at the question therefore, *a priori*, it cannot be presumed that the revocation has passed. On the other hand, what must have followed if such had been the fact? Why, that the *American* Minister in this country must have been in possession of most decisive evidence upon the subject, for I cannot but suppose that the first step of the *American* Minister at *Paris* would have been to apprise the *American* Minister at this Court, of so momentous a circumstance, with a view to protect the *American* ships and cargoes which had been brought in under the *British* Orders in Council. If no such information has been received by him, there never was a case in which the rule “*De non apparentibus et non existentibus eadem est ratio*” can more satisfactorily apply. For it is quite impossible that such a revocation can have taken place without being attended with a clear demonstration of evidence that such was the fact.

I am, therefore, upon every view of the case, of opinion that the *French* Decrees are at this moment unrevoked. But if by any possibility it can have happened that an actual revocation has taken place against the manifest import of the only public *French* Declaration referred to, and without having been yet communicated to the *American* Minister in

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this Country, who was so much concerned to know it, for the benefit of the persons for whose protection it must have been principally meant; the parties will have the advantage of the fact, if they can shew upon an appeal that those Decrees have been revoked at a time and in a manner that could justly be applied to the determination of these causes; revoked at a period which would reach the dates of this capture, and in a manner unincumbered with stipulations, which it was well known this Country could never accept, and to which there was every reason to presume that the Justice of *America* could never permit her to accede, upon the refusal of *Great Britain*. On such a state of evidence the Claimants will carry up with them to the superior Court the principle that might entitle them to protection according to the view which this Court has taken of the subject. But things, standing as they do before me—all the parties having acted in a manner that leads necessarily to the conclusion, that no *bona fide* revocation of the *Berlin* and *Milan* Decrees has taken place, I must consider these cases as falling within the range of the *British* Orders in Council, and as such they are liable to condemnation.

APPENDIX.

SANTA ANNA, *Larrinago*.

F.

NOTE to page 181.

ORDER IN COUNCIL, 4th July 1808.

HIS Majesty having taken into His consideration the glorious exertions of the *Spanish* nation for the deliverance of their country from the tyranny and usurpation of *France*, and the assurances which His Majesty has received from several of the provinces of *Spain* of their friendly disposition towards this kingdom; His Majesty is pleased, by and with the Advice of His Privy Council, to order, and it is hereby ordered:—

Cessation of hostilities with Spain.

First.—That all hostilities against *Spain* on the part of His Majesty shall immediately cease.

Secondly.—That the blockade of all the ports of *Spain*, except such as may be still in the possession, or under controul of *France*, shall be forthwith raised.

Thirdly.—That all ships and vessels belonging to *Spain*, shall have free admission into the ports of His Majesty's dominions, as before the present hostilities.

Fourthly.—That all ships and vessels belonging to *Spain*, which shall be met at sea by His Majesty's ships and cruizers, shall be treated in the same manner as the ships of states in amity with His Majesty, and shall be suffered to carry on any trade, now considered by His Majesty to be lawfully carried on by neutral ships.

Fifthly.—That all vessels and goods belonging to persons residing in the *Spanish* colonies, which shall be detained by any of His Majesty's cruizers after the date hereof, shall be brought into port, and shall be carefully preserved in safe custody to await His Majesty's further pleasure, until it shall be known whether the said colonies, or any of them, in which the owners of such ships and goods reside, shall have made common cause with *Spain* against the power of *France*.

A P P E N D I X.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice Admiralty, are to take such Measures herein as to them may respectively appertain.

STEPH. COTTRELL

BYFIELD, *Forster.*

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ORDER IN COUNCIL, 4th May 1808.

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and the ports of
Zealand.

THE Right Honourable *George Canning*, His Majesty's Principal Secretary of State for Foreign Affairs, has this day notified to the ministers of friendly and neutral powers resident at this Court, that His Majesty has judged it expedient to establish the most vigorous blockade of the port of *Copenhagen*, and of all the other ports in the island of *Zealand*; and that the same will be maintained and enforced in the strictest manner, according to the usages of war acknowledged and allowed in similar cases.

LUNA, *Southworth.*

H.

NOTE to page 190.

ORDER IN COUNCIL, 26th April 1809.

Modification of
blockade of
21th Nov. 1807.

WHEREAS His Majesty by His Order in Council of the 11th November 1807, was pleased, for the reasons assigned therein, to order, that "all the ports and places of *France* and her allies, or of any other country at war with His Majesty, and all other ports or places in *Europe* from which, although not at war with His Majesty, the *British* flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, should from thenceforth be subject to the same restrictions, in point of trade and navigation, as if the same were actually blockaded in the most strict and rigorous manner;" and also to prohibit "all trade in articles which are the produce or manufacture of the said countries

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countries or colonies :” And whereas His Majesty having been nevertheless desirous not to subject those countries which were in alliance or in amity with His Majesty, to any greater inconvenience than was absolutely inseparable from carrying into effect His Majesty’s just determination to counteract the designs of His enemies, did make certain exceptions and modifications expressed in the said Order of the 11th *November*, and in certain subsequent Orders of the 25th of *November*, declaratory of the aforesaid Order of the 11th of *November*, and of the 18th of *December* 1807, and the 30th of *March* 1808 :

And whereas in consequence of divers events which have taken place since the date of the first mentioned Order, affecting the relation between *Great Britain* and the territories of other powers, it is expedient that sundry parts and provisions of the said Orders should be altered or revoked :—

His Majesty is therefore pleased, by and with the advice of His Privy Council, to revoke and annul the said several Orders, except as herein-after expressed ; and so much of the said several Orders, except as aforesaid, is hereby revoked accordingly.

And His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That all the ports and places as far north as the river *Ems* inclusively, under the government styling itself the Kingdom of *Holland*, and all ports and places under the government of *France*, together with the colonies, plantations, and settlements in the possession of those governments respectively ; and all ports and places in the northern parts of *Italy*, to be reckoned from the ports of *Orbitello* and *Pesaro* inclusively, shall continue and be subject to the same restrictions in point of trade and navigation, without any exception, as if the same were actually blockaded by His Majesty’s naval forces in the most strict and rigorous manner ; and that every vessel trading from and to the said countries or colonies, plantations or settlements, together with all goods and merchandize on board, shall be condemned as prize to the captors.

And His Majesty is further pleased to order, and it is hereby ordered, That this Order shall have effect from the day of the date thereof, with respect to any ship together with its cargo which may be captured subsequent to such day, on any voyage which is and shall be rendered légal by this Order, although such voyage at the time of the commencement of the same was unlawful, and prohibited under the said former Orders ; and such ships upon being brought in shall be released accordingly ; and with respect

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to all ships, together with their cargoes, which may be captured in any voyage which was permitted under the exceptions of the Orders above mentioned, but which is not permitted according to the provisions of this Order, His Majesty is pleased to order, and it is hereby ordered, that such ships and their cargoes shall not be liable to condemnation, unless they shall have received actual notice of the present Order before such capture; or, in default of such notice, until after the expiration of the like intervals from the date of this Order, as were allowed for constructive notice in the Orders of the 25th of *November* 1807 and the 18th of *May* 1808, at the several places and latitudes therein specified.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and Judges of the Courts of Vice-Admiralty, are to give the necessary directions herein as to them may respectively appertain.

STEPH. COTTRELL.

ELIZABETH, *Nowell.*

K.

NOTE to page 199.

ORDER IN COUNCIL, 17th *May* 1809.

Explanatory
of blockade
26th *April* 1809.
Eastern and
Western *Ems*
included.

WHEREAS by an Order in Council, bearing date the 26th *April* 1809, His Majesty was pleased to direct, that the blockade imposed by that Order should extend to all ports and places as far north as the river *Ems* inclusively; His Majesty, more distinctly to ascertain the places to be taken as included within the limits of the said blockade, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That the said blockade shall be construed to extend so as to comprehend the Eastern as well as the Western *Ems*; and to prevent all vessels from sailing into or out of that river by any channel to the westward of the Island of *Juyß*: And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice-Admiralty, are to give the necessary directions herein as to them may respectively appertain.

STEPH. COTTRELL.

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RAPID, *Fleming.*

NOTE to page 228.

Translated from the Dutch Language on behalf of the Captors.

Sir and most esteemed Friend, *New York, 18th Sept. 1806.*

THE Letter and accompanying Inclosures, which I this day dispatch to His Excellency the Minister of Colonies, *via Tonningen*, will, I expect, be communicated to you. I trust my conduct will be approved by His Excellency, and that his Excellency will be pleased to explain himself, as well with regard thereto, as respecting the contents of my letter to Marshal Daandels. The safest channel of correspondence is by way of England, or Paris through the medium of the *Dutch* minister, whom the *American* minister will not refuse inclosing a letter for me in his dispatch.

Letter, dated *New York, 18th Sept. 1806*, from *A. G. Van Polanen*, addressed to *Mr. A. D'Ozy, Amsterdam.*

The new *Englisch* minister was received at *Washington* by the secretary of state, and recognized as such; but the latter left *Washington* shortly afterwards, which at least announces that they are in no haste to open the negotiations there.

We have this day received intelligence of the capture of *Flushing* by the *Englisch*. I repeat my request, that my letters may be inclosed under cover to the house of *Jacob le Roy* and Son, of *New York*, except those which may be dispatched by way of *France* through the channel of the minister.

My son-in-law, *De Marolles*, was appointed lieutenant-colonel and commandant of *Batavia* in the month of *February*, but has been permitted to reside at *Ryswick*.

My cousin, *Van Bensacken*, was well on the 25th *March*. Be assured of the permanent esteem of

Your most obedient humble servant and friend,

(Signed) R. G. VAN POLANEN.

(Supercribed)

Mr. A. D'Ozy, Amsterdam.

Envelope, supercribed "To His Excellency the Minister of Marine and Colonies, residing at *Amsterdam*," inclosing the following Dispatch.

SIR,

I HAVE the honour to forward to your Excellency the inclosed duplicate of my dispatch to His Excellency Marshal *Daandels* of the 20th ultimo, to the contents of which I take the liberty of respectfully referring myself.

Letter, dated *New York, 18th Sept. 1809*, from *R. G. Van Polanen*, inclosed in the above envelope.

The

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The political relations of the United States of *America* are now arrived at that pitch, that it is become more problematical than ever whether it will be possible on this side to preserve peace with *France* and *England*, so far as the events on the continent of *Europe* have an influence on the system of *France* and *England* with regard to *America*. It is expected that the decisive action of the *French* emperor with the archduke *Charles*, whereof different issue was expected after those of the 21st and 22d *May*, will inspire the *English* cabinet with more moderation towards *America*, and it is therefore not considered impossible that the existing negotiations with *England* may be attended with a favourable issue. The consequences thereof with regard to *France* can, it is apprehended, easily be anticipated, as well from former declarations as from two letters published and distributed at *Paris* in the month of *May*, by leave of the government, and translated and published here in the beginning of last month. These letters, which bear date at *Paris* on the 10th and 20th of *May* 1809, are signed D. C. and addressed to Mr. *Le Comte*, contain many elaborate remarks on the former raising of the embargo with regard to *England*, and a positive declaration that *France* neither can nor will suffer the *Americans* to trade with the continent of *Europe* in colonial produce, as the *English* commerce would thereby be indirectly benefited.

These publications, it is true, were suppressed in *Paris* by the police, after receipt of intelligence of the non-confirmation of the provisional arrangement between *England* and *America*, but it is not the less regarded here as a proof of what may be expected on the part of *France*, should *America* succeed in adjusting her differences with *England*.

It cannot, I presume, be indifferent either to your Excellency or the *India* Government to be informed what is to be hoped with regard to the *American* trade to *Java*; neither can I forbear impressing upon your Excellency my firm conviction that the exportation of specie from hence to *Batavia* cannot be effected on the former footing, unless a considerable deduction take place in the price of coffee.

In a private letter received by me from the Director General *Van Ysseldyke*, under the date of the 18th *March* 1809, he observes that the contingents furnished first by the officers and people of property, and afterwards by the *Chinese* and *Moors*, had enabled the *Batavian* government to retrieve itself for the present year; but that the prospects for the future were most deplorable, should the *American* navigation not be revived again,

Should

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Should your Excellency attach equal importance to this measure, speedier hopes might be entertained in case your Excellency thought fit to authorize me to lower the price of coffee at *Batavia*, and whatever reluctance I may feel in expressing myself more strongly with regard thereto, I must beg leave to state it to your Excellency as my opinion, that unless the price of coffee be lowered to 14 dollars *per picol*, even under more favourable circumstances than the present, there will be no hopes of the resumption of the former trade from this place to *Batavia*.—I have the honour to subscribe myself, with the most profound respect and consideration,

Your Excellency's obedient servant,

(Signed) R. G. VAN POLANEN.

New York, 18th Sept. 1809.

Java coffee is still offering at 24 or 25 cents, with the drawback and as long credits which brings the price up to 19 or 20 cents *per pound*, payable at 3, 4, and 6 months, but no purchasers are to be met with.

The brig *Goldsearcher* will not sail from hence until the 26th of next month, and if not too long detained at *Sourabaya*, I may expect an answer from Marshal *Daandels* in about 6 months.

COPY.

To His Excellency Marshal *Daandels*, Governor General of
Dutch India.

SIR,

WHEN in the year 1807, by the capture and burning of the major part of the private ships belonging to the inhabitants of *Java*, and the weak state to which the few remaining ships of war were reduced, as well by the mortality as insubordination of their crews, his Excellency the then governor foresaw a considerable augmentation of the general difficulties and risks with which the eastern factories have hitherto been supplied with money and stores by the *Batavian* government. The obstacles that presented themselves for the ensuing year seemed rather to have multiplied than diminished, and under these circumstances the governor saw no other means of averting the danger to which the factories would be exposed, should they be deprived of all supplies from *Java*, than laying open the trade to those factories so far as the annual wants could be thereby provided for.

Copy of a Letter
from R. G. Van
Polanen to Mar-
shal *Daandels*,
governor general
of *Dutch India*,
dated *New York*,
20th Aug. 1809;
also inclosed in
the envelope.

This

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This measure, so repugnant to the old and then existing system of exclusion of all foreign commercial intercourse with our eastern colonies, could be justified only by a conviction of the most urgent and unavoidable necessity, which nothing but a concurrence of circumstances could bring about, and this necessity was judged actually to exist.

The mode of accomplishing this object was next taken into consideration by the governor general, and as it was by no means his determination wholly to lay open the trade to the *Moluccas*, but only so far as it had become necessary to the annual supply of those factories with specie and stores, which could only be effected by contract in *America*.

This commission was conferred upon me by the governor and director general, without any communication with the High government, for the reasons detailed in their dispatch of the 15th of *November 1807*, to his Excellency the minister of colonies. It was deemed expedient, at my request, to limit me in the execution of this commission, as well with respect to the quantity of spices I might dispose of, as the prices to be stipulated for the same. At the consultations which took place on this subject with the *sabaandhaar Van Braam*, a person perfectly conversant with mercantile affairs, and myself, we observed that the large quantity of spices calculated as necessary to be appropriated in the liquidation of the stores for the eastern factories, could not be disposed of in *America*, or at least but at low prices; that they must therefore either be exported to *Europe* or transported directly from *Amboyna* to *China*; and we, regarding the latter as most advantageous for the *American* merchants, it was, in a calculation of Mr. *Van Braam's*, founded on the price of spices in *China* during the four last preceding years, hypothetically put, that to enable an *American* merchant to gain as much on an expedition to *Amboyna* as on a coffee freight from *Java* to *America*, spices ought to be sold to him at the following prices, *viz.*

Cloves at 56 dollars per picol,

Nutmegs a 180

and

Mace a 335.

It was rightly conceived that it was not to be expected an *American* would embark in an unusual speculation for a large quantity of spices, without a prospect of deriving a profit at least equal

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equal to that arising from a cargo of coffee, an article until then of direct sale, and which could not be expected of a large quantity of spices.

In the private instructions given to me, I was limited to the same price at which spices had been sold in *China* during the last four years, after deduction of a moderate profit, to be calculated for the circuitous mode of fetching the spices from *Amboyna* and *Banda*, and for every species of risk, which must altogether be left for account of the owners of the ships.

What compensation the *American* merchant might justly demand for the risk and hazard accompanying an expedition direct to *Amboyna*, and from thence to *China*, could not be foreseen, much less calculated at *Batavia*, as it depended in the first place upon the risk to which the *American* trade in general was exposed at the period of my arrival in *America*; and secondly, upon those particularly connected with a voyage to *Amboyna* and *China*.

On my arrival in *America*, in the month of *March* 1808, I found that the general embargo laid on all *American* shipping had put an entire stop to all maritime commerce, but in my conversation with the *East India* merchants I discovered, that, had not this obstacle then existed, it would have been possible for me to obtain the prices stated in Mr. *Van Braam's* calculation, after deduction of a moderate profit, and incumbered with the insurance.

In the first effervescence consequential upon the raising of the embargo, with reference to *England*, in the month of *March* of the present year, and the expectation then entertained of the approaching adjustment of the differences subsisting between the two nations, I have every reason to believe, that had I then thought myself sufficiently authorized for that purpose, I could have executed my commission on a much more advantageous footing than the present one; but as it expired on the 1st of *January* of the present year, and Mr. Secretary *Meyer* had arrived here some time before, charged with a special commission from your Excellency, without any further orders reaching me on the part of your Excellency, I was bound to conclude, either that your Excellency judged the execution of my commission no longer necessary, or that it had been committed to Mr. *Meyer*.

I deemed it incumbent upon me, however, on my arrival in *America*, to acquaint his Excellency, the minister of colonies, with the object of my visit to this country, but found no opportunity of so doing until the beginning of *July* following, when I trans-

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mitted his Excellency certain documents belonging thereto. A Mr. *Schuuzmann*, just returned from the *West Indies*, and who, as he affirmed, had been repeatedly charged with the conveyance of official dispatches, offered me his services for that purpose, and, notwithstanding he was captured on his voyage to *France*, carried into *England*, and there detained for four months, he succeeded in preserving the packet I confided to him, and on the 16th of *March* of the present year delivered it into the hands of his Excellency the minister.

In pursuance of which, on the 13th of *July*, I received from his Excellency the minister of marine and colonies an order, under date of the 9th *April* of the present year, whereby I am authorized, should a raising of the embargo remove the obstacles which impeded me in the execution of my former commission, in that case to proceed therewith anew.

To which is superadded the following extension of my former commission. It is his Majesty's pleasure, that the several articles wanted by Marshal *Daundels* should be dispatched immediately through you. I will not embarrass you with any restrictions to the mode of its accomplishment, but shall confine myself to observing that the payments must be made at *Batavia*, with this further authority, viz.—Notwithstanding any appointment to the situation of Counsellor in ordinary of *Dutch India*, to remain in *America* until further orders, for the purpose of protecting the interest of the colonies, and attending to and cultivating the relations between them and this country.

On receipt of this commission, I lost not a moment in trying whether it were possible to execute the first branch thereof, but prior to obtaining an answer to certain letters, addressed by me to some merchants on the subject, intelligence was received here, on the 21st following, of a declaration having been made by the *English* government, that her minister in *America*, in his provisional engagement, entered into with the *American* government in the month of *April* in the present year, had exceeded his instructions; and that *Holland*, the island of *Walcheren*, the sea coast to the south of the *Weser*, as well as *France*, the coast of *Italy* in the power of the *French*, the *French* and *Dutch* colonies, were again declared in a state of blockade.

Hereupon followed a proclamation of the President of the *United States*, on the 9th instant, renewing the suspension of the *American* trade to *England* and her colonies, whereby the disputes between

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between the two governments are not only again revived, but the following, amongst other concessions, now openly demanded from the United States of *America*, on the part of *England*, viz.—The relinquishment of all trade to the colonies of the enemies of *England*.

With *France* affairs are on no better footing; all *American* property continues sequestered in *France*; *American* merchantmen are every where captured and carried into port by *French* privateers in *Italy* and the States of the church; also *American* ships and cargoes are laid under sequestration, a measure adopted likewise in *Holland*, with regard to all colonial produce, which is put under the king's lock, for the purpose of detention until after a general peace. In *Tonningen* alone *American* ships and cargoes are as yet left free, though the *Danes* and *English* have captured *American* vessels destined for *Sweden*.

The horizon, therefore, cannot be more gloomy for the *American* maritime commerce. Their navigation to *South America*, and certain *Spanish* and *Portuguese* ports of *Europe*, still continues uninterrupted, but the only port left them in the *West Indies* is that of *Saint Bartholomew*, belonging to *Sweden*. Negotiations were, it is true, commenced in the beginning of last month, between the *American* minister at *Paris* and Mr. *de Hauterive*, but this is regarded as a mere political manœuvre to embarrass the negotiations with *England*; and it is expected that on the part of *France*, in this negotiation, there will again be made the former or similar propositions which have been already deemed inadmissible, as incompatible with a strict neutrality. People begin to be now pretty generally impressed with a conviction that it will no longer be possible for this country to adjust her differences with one of the belligerent powers, without incurring the hostility of the other; that neutral rights cannot otherwise be protected than by force of arms; and that the time they had for preparing themselves for that purpose has been passed in inactivity.

The only means of extrication from this equally difficult and humiliating situation, would be that of chusing between *France* and *England*, but the dissensions existing here will not allow of it.

The faction at present in power is too well convinced that a war with *England* would soon introduce into the government the now prostrate party, and it is to this personal consideration that the honour and interests of the nation are sacrificed. A war with

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As no safer ground can be taken in political prospects than that of concluding from the interests of the nation whose present system we undertake to criticize ; we have no other prospect in the present state of estrangement between *France* and *America*, than that the neutrality of this country, and a free commerce, which must be the consequence thereof (in all articles, contraband alone excepted), will not be better respected by *France* in future than it has hitherto been.

The *French* government, sacrificing every thing to the great project, of which the principal features are no secret, does not in the least suffer itself to be impeded therein by the commercial interests of *France* and her allies. It considers them as a temporary sacrifice, indispensable to the accomplishment of its grand object, the humiliation and weakening of *England*. There existed, notwithstanding, at the commencement of this war, a motive for preserving peace with *America*, viz.—The interest of the *French* colonies. But all the trans-marine possessions of *France* are fallen into the hands of the *English* ; except *Guadeloupe*, *Mariegalante*, and the *Isle of France*, which are under effective blockade by the *English*. *France*, so long as the present system respecting foreign commerce is persevered in, has no other interest in the preservation of peace with *America* than so far as her political interests will not allow of this country's forming a closer connection with *England* ; but she knows how reluctant *America* would be to proceed to such a connection, and that even were she really to resolve upon it, and to break with *France*, the least concession on her part would again strike such resolution and delay its execution.

England, on the other hand, has, for various reasons, a real interest in preserving peace with *America*, but she calculates on the defencelessness of this nation, and on civil dissensions, and the weakness of the government, which is a consequence thereof ; her present omnipotence at sea makes her look down with contempt upon a nation whose sea coast and mercantile towns are protected by nothing but incomplete fortifications, and whose navy consists of seven frigates. *England* knows also by experience how passively this government bears her ill treatment, and thinks she has only to take care she does not too often exceed the measure thereof, and, if that happens, to offer negotiations and indemnifications. Be it far from me, however, to conclude, from the present statement, that the *American* government will be able to persevere in the system she has hitherto adopted ; on the contrary, I apprehend
the

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the negotiations now subsisting with *England* and *France* will determine the practicability of preserving peace with both in future. The negotiations may, indeed, on both sides be protracted, with a view to gain time, and to make use of intervening circumstances, but they must lead to the developement of the dispositions of *France* and *England*, whether, and how far they will be inclined to concur in the general principles already adopted, or hereafter to be adopted by *America*, as forming the basis of their neutral rights; and the demand now brought forward by *England* must definitively dispose of the most prominent point in dispute with *America*, viz — The right of a neutral nation to trade in time of war with the colonies of the enemies of *England*, from whence they were excluded in time of peace.

In the event of an unsuccessful issue of the present negotiations, recourse will not be had again here to a general embargo, which can only be maintained on the part of government by measures of constraint and persecution, which, as has already appeared, may be productive of domestic troubles. Should *England* or *France* therefore persevere in refusing henceforth to respect the neutral rights of *America*, I cannot expect any other than that this government will find itself constrained to yield to the desires of the merchants, by permitting them to carry on their trade, sword in hand. This, although no declaration of war, would amount to nothing less than a state of hostility towards that nation against which it were exercised. But it is a middle course, to which the two parties wherein this country is divided, will more readily agree, as no connection will thereby be formed with either of the belligerent powers, and a channel consequently left open for accommodation.

There are persons who conceive that the present suspension of commerce with *England* will be the only means of bringing her to reason, but, so long as a neutral port is open, the *English* will by that channel get *American* produce, and introduce *English* manufactures into *America*; *America* will thereby be obliged to sell her produce cheaper, and pay dearer for her supplies. The *English* navigation would, moreover, be benefited by it.

However rash it may be, especially in these times, to form a positive opinion, I conceive it incumbent upon me to concur with those who assert, that *America* will not be able to adjust her differences with the two principal powers in *Europe* on permanent grounds, and that should it be accomplished with the one it would involve a state of hostility with the other. This is the avowed

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opinion of all who have distinguished themselves as statesmen in this country. Formal declarations of war are not expected from either party, but (and this is the important point of view I take of political events) the commerce of *America* will continue to be the object of the violence and rapacity of the one or the other side. Her extensive commerce will in future be most narrowly circumscribed by prohibitory laws and regulations on the continent of *Europe*; by the uncertain state of her political relations, and the violated sanctity of all national engagements; by blockades, proclamations, and sequestrations, to which the belligerent powers reciprocally resort; and by distrust of the good faith of any nation, while the violent hate which increases more and more between the principal parties in this devastating war, gives rise to an infuriate spirit of animosity and revenge, to which both the national interests and every other consideration are sacrificed.

And it cannot otherwise be expected, but that a defenceless nation, whose commerce and spirit of enterprize is viewed with increasing jealousy, and by both parties regarded as the means whereby its antagonist is benefited (either by both, or alternately by one of them), will continue a victim to the interests or the passions which, in the present violent contest between two of the most powerful people, constantly succeed each other, and if we add hereto that a general peace is not within the reach of present existing prospects. But your Excellency will not be surprised if, under my present conceptions and impressions, I deem it incumbent upon me to omit nothing to put your Excellency in possession of a statement of affairs so immediately affecting the eastern colonies of our mother country.

But this is not the only motive which induced me to adopt the determination of originating an opportunity of commencing that official correspondence with your Excellency, to which I am equally bound and entitled by the gracious order of His Majesty, and the relation in which I stand with reference to the *India* government.

The subject respecting which I feel myself obliged to trouble your Excellency with a representation of, is too important for me not to exert myself to possess your Excellency, as speedily as possible, with my observations thereon. The great importance attached by me to the revival of the *American* trade to *Java*, and a fall in the price of *Java* coffee, without which I hold myself assured no hopes are to be entertained thereof, is founded on my apprehension,

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apprehension, that it will not be much longer possible to carry on the public business in our *Eastern* possessions without a supply of specie, and other articles indispensable for that purpose; a supply of the latter can, if necessary, be wholly or partially replaced by other articles in hand, or attainable in *India*. And I think I can pledge myself to your Excellency, that this supply, under almost every possible circumstance, will not altogether be suspended, especially as people here will be convinced of the great want thereof in *Java*, and consequently entertain hopes of deriving great advantages therefrom. The expeditions moreover can be made from hence in small fast-sailing vessels, and will not require the investment of any great capital; but it is quite otherwise circumstanced with regard to the want of specie. The only means by which the *India* government can either be supplied with a sufficiency of specie, are to accept the proposition made (if I am correctly informed) by the *Java* princes, but as to the expediency of which many serious doubts exist; or to impose upon the former and present officers, an obligation to assist the government, and to make a considerable reduction in the salaries of the latter, as to the propriety of which no doubt can be entertained, seeing fortunes in *India* are, with very few exceptions, acquired either directly or indirectly at the expence of the country. And it cannot be thought necessary, at a period when the existence of His Majesty's colonies is at stake, that the officers should continue to live in luxury and abundance, and be moreover so pensioned by the Government as to enable them to improve their fortunes, and, indifferent to the general disaster, to withdraw themselves from the danger. But all these Expedients are but of a temporary and inadequate nature. The specie issued by the Government, and its treasury, is for certain reasons well known, not brought into general circulation again, at least not such as Government itself can controul; the importation of a new supply of specie is therefore indispensable; the mother country cannot by any possibility provide the same, there existing at this moment no neutral power in *Europe*; and it is from the United States of *America* alone therefore, that a supply can be expected, unless the present state of affairs should give rise to a greater degree of liberty and security to the *American* navigation.

Even supposing this were the successful result of the critical and hazardous state of the existing political relations of *America*, it is not to be expected that the *Java* coffee trade can be revived
with

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with any prospect of advantage so long as the price is kept up in *Java* at 18 d. *per* picol; and this is what I have principally proposed to myself demonstrating to your Excellency herein.

The eagerness with which *Java* coffee was sought after during the last and present war, principally by the *Americans*, induced the Government there gradually to enhance the price; until the year 1807 they had no reason to doubt the propriety of such advance, notwithstanding several capital mercantile houses, as I am credibly informed, had after the first six months of that year, already relinquished their trade to *Java* on account of such enhanced price, a circumstance probably unknown at *Batavia*, owing to the embargo laid on *American* shipping in the month of *December* in that year.

Your Excellency, however, will have had ample opportunity to judge of the propriety of such advance, since your Excellency must have found, that, notwithstanding the raising of the general embargo, and the strong expectations entertained between the beginning of *March* and the 21st of *July* of the present year, of an adjustment of the differences with *England*, no expeditions have been made from hence to *Batavia*, save one large and three small vessels, and that principally, if not solely, from a hope of realizing a considerable profit on the outward cargo.

In addition to the reasons that already existed in the latter end of the year 1807, for giving up the *Java* trade on that footing, several others have since occurred, the enumeration of which at present would be perfectly useless, as my object, amongst the existing and possible future circumstances of this war, and the influence of political events and commercial interests, is, to represent to your Excellency with regard to coffee, that it cannot be supposed, amongst all these surprizing revolutions, the events of late years, and those that may probably take place this year, both in *Europe* and the *West India* colonies, that the value of this produce should continue the same. Many of these events have already had considerable influence thereon, and others that have arisen therefrom must have a more lasting influence on the cultivation and price of coffee.

The interest I have from earlier connections uniformly taken in the welfare of our colonies in the Island of *Java*, which for nearly these fifteen years past has been exclusively indebted to the sale of coffee for its existence, has induced me never to lose sight of this object, and the relation in which I now stand, with reference thereto,

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hereto, makes it incumbent upon me to obtain more precise information in respect thereof. The data on which the following calculation was founded were for the most part obtained from intelligent merchants unconnected with the coffee trade, and on a comparison of the various answers I have received to Queries proposed, it appears to me that

The important event which originally occasioned the rise in the price of coffee, was the devastation of the *French* part of *St. Domingo*; that colony produced to *Europe*, down to that period, 72 million pounds of coffee, *Jamaica* 1 million, and the remaining *English* Islands 2½ millions, the *Spanish* colonies 1 million, *Martinique*, *Gaudaloupe*, and other *French* Islands, 3½ millions, constituting together 80 millions pounds of coffee.

The destruction of the major part of the plantations in *St. Domingo*, has reduced the produce there from 72 to 15 million pounds, but it has tended to encourage the cultivation of that article in other places, and it is calculated that it produces as follows, viz.

<i>Jamaica</i>	-	-	-	26 millions
<i>Antigua</i> and other <i>English</i> Islands	-			8
<i>Gaudaloupe</i> , &c.	-	-	-	9
<i>Cuba</i> and <i>Porto Rico</i>	-	-	-	9
<i>Spanish</i> South America	-	-	-	15
<i>The Brazils</i> and <i>Cayenne</i>	-	-	-	2

To which being added the 15 millions now produced by *St. Domingo*, it appears that the produce of coffee, in the above colonies, has increased since the year 1790, from 80 to 84 millions of pounds.

With regard to the growth of coffee in *Surinam*, *Demerary*, and *Berbice*, I have not been able to obtain any correct account; but it is asserted, that the produce of *Surinam* has experienced an annual increase of three or four million of pounds, from which it is to be inferred that notwithstanding the diminished produce of *St. Domingo*, the growth of coffee in the *West Indies* has increased since the year 1790, from 80 to 88 millions of pounds.

It is not apprehended that the produce of coffee in *Jamaica*, and other *English* and *French* colonies, will experience a further increase, though it is possible that it may in *Cuba*, *Porto Rico*, and in *Spanish* and *Portuguese* South America; where the soil and other circumstances are peculiarly favourable to the cultivation of that article, insomuch that the expences attending the same are calculated to amount to one-third less, independently of their being exempt from tornadoes and other casualties of the climate.

Even

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Even supposing there were any error in the herein-before enumerated round numbers, I hold myself assured that it would not invalidate the hypothesis, that the diminished produce of *St. Domingo* is amply compensated by the increased produce of other colonies, and that such deficiency will still more increase in the *Spanish* and *Portuguese* colonies, is by all reports from thence placed beyond all doubt.

It is even expected here that too great progress will be made therein, and this prospect will be realized should the assurance prove well founded that was formerly given to me in 1795 and 1796, by several emigrant planters of *St. Domingo*, and, amongst others, by Mr. *Moreau de St. Mery* (the historian of that island, whose otherwise highly esteemed work, from its prolixity, I must presume, is but little read in *Europe*) viz. that in 1790 the cultivation of coffee in general had so much increased, that it could no longer be disposed of in *Europe* but at extremely low prices, and produced but an inconsiderable profit to the planters in the *West Indies*.

They might, at that time, have conceived they had proceeded too far, and if it then took place, they have again fallen into the same error; but it is not perceptible from the irregular supply of *Europe*, and the immense quantity of coffee locked up in the *English* and *American* warehouses.

And if we add hereto, that the prosperity of the inhabitants of the *European* continent has, since 1790, been considerably diminished by so many successive and apparently endless wars, and that even the disasters consequential thereon will for many years be felt; that so long as the present maritime war shall continue to last, even under the most advantageous circumstances in which *America* may occasionally be placed, the same will not be permanent. Freights and insurance will be extremely high, and the prices of coffee experience a considerable fluctuation, so that on a coffee speculation to *Java*, a year at least must elapse ere it can be brought to an *European* market, by way of *America*, a circumstance that makes this trade subject to infinitely more casualties than that with the neighbouring *West India* islands and *South America*. But I hold it incumbent upon me to impress upon your Excellency my most conscientious conviction that under all the circumstances no hopes can be entertained of the *Americans* bringing away the immense stock of coffee now on hand in *Java* at 18 dollars per picol.

I do

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I do not fear, on the responsibility which I feel is attached to this declaration, positively assuring your Excellency of this ; but were I to be called upon to state at what price coffee ought to be sold at *Batavia*, I feel, I must confess, some reluctance at making a formal declaration with regard thereto ; indeed I conceive it more proper that your Excellency should yourself be enabled to adjust this point, by a statement of the price at which coffee can now be obtained in the *English* and *Spanish* islands, and *Spanish* and *Portuguese* *South America*.

I understand the average price hitherto given is 16 cents *per* pound ; but that coffee is not shipped with a view to profit, which alone is expected to arise on the outward cargo from hence. And I well know that this trade is carried on in small, light, and unexpensive vessels, consequently also with the investment of a small capital, and completed in less than two or three months. The insurance for these voyages is seldom higher than 1 *per cent.* to *Batavia* and back, but now 15 *per cent.*

The ordinary price of coffee in the *West Indies* and *South America*, as accepted in payment for cargoes transported thither, is in the proportion of 16 *a* 14½ cents, at which the pound is calculated in *Batavia*, at 18 dollars *per* 125 lb. and this alone proves that this price is computed too high at *Batavia*. In the *West Indies* the *Americans* are compelled to accept coffee and other produce, but a speculation in that article to *Java* is a voluntary act, and merely undertaken with a view of deriving an advantage therefrom.

But few ships import merchandize into *Batavia*, and seldom is any thing got by it. In general, and with very few exceptions, is the profit of an expedition solely expected on the return cargo.

The price of coffee is now extremely high in *Europe* ; but I have seen a letter from *Amsterdam*, dated in the month of *May*, stating, that the arrival of a few ships would probably reduce the prices to 18 stivers and lower ; neither can it be expected, even should the supply and importation be subject to no obstacles, that the former general consumption of coffee will again take place, so long as the same does not fall into the former prices.

There is an advantage of upwards of 7 *per cent.* in favour of the *Americans*, in the difference of the weight in *America* and *Batavia*, but which is absorbed by the indraft, particularly if coffee is laden green. In *Holland* the difference in the weighing is 10 *per cent.* against

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against the importer from hence, the tare 7 a 8, and a turn of the scale, as it is there called, is moreover given of 1 or 2 *per cent.*

From various original account sales from thence, it appears that in general a loss is sustained on unloading at *Amsterdam*

On coffee, in small bales, of 20 a 22 <i>per cent.</i>	}	In the weight.
Large ditto, 19 a 20		
Hhds. - 16 a 17		

The freight from hence to <i>Amsterdam</i> is about	-	10
Commission	-	2½
Guarantee of the responsibility of the purchaser	-	1
Import duties	-	3
And various petty charges	-	1

In case the *mesne* difference on the discharge in *Holland* be computed at 18 *per cent.* in the weight, and the other charges herein-before enumerated added thereto, a cargo of coffee from hence is incumbered with 35½ *per cent.* from which, as usual, is further deducted from the amount of the sale 4 *per cent.* which together constitute a charge of 39½ *per cent.* In case the bills of exchange for the cargo can be disbursed at par, which cannot take place in an extensive commerce with *Holland*, and sometimes occasions a loss of 5 *per cent.* to which being superadded the insurance of from 3 a 50 *per cent.* (now from 10 a 15 *per cent.*) the preceding calculation closely approximates to the rough estimate whereon they generally act here, *viz.* That coffee must be sold 50 *per cent.* higher in *Amsterdam* before any profit can be derived thereon on exportation from hence.

This does not include the import duty of 5 *per cent.* in *America*, which, by the exportation within the year, by way of drawback is returned, with a small deduction for the custom-house.

The following is, I trust, a tolerable accurate account of the difference in the sugar crop of 1790 and 1808:

	1790.	
In the <i>English</i> islands	-	202 millions lbs.
<i>St. Domingo</i>	-	220
<i>Guadaloupe</i> and <i>Martinique</i>	-	40
<i>Spanish</i> colonies	-	50
		512 millions.
Together		

With regard to the *Dutch* colonies and the *Brazils*, I have not yet been able to obtain any precise information.

1808.

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1808.

<i>English islands</i>	-	-	280 millions lbs.
<i>Martinique, Guadaloupe, &c.</i>	-	-	90
<i>Spanish colonies</i>	-	-	280
<i>St. Domingo</i>	-	-	30
Together			680 millions.

Exclusive of *Demarary* and the *Brazils*, where the cultivation of sugar is considerably increased, which makes a difference in favour of the present period of 178 million of lbs.

Were it not for the prohibition of the distillation of spirits from grain in *England*, and the permission of the use of sugar, the price of that article could not have maintained itself, but the demand is, in some measure, hereby equalized between the crop and the consumption.

A large quantity of *Jamaica* and *St. Croix* sugars were imported into the *United States*, and preferably used, at a mesne price of 6 dollars *per* cwt. white *Havannah* sugars enjoy the same privileges, and are now sold at the uncommonly high price of 11 & 13 dollars *per* cwt. *Batavian* sugars, which are peculiarly adapted for refinement, continue selling at 2 to 3 dollars less than the former, are now scarce and at 8½ dollars, and therefore cannot be imported to the same advantage as the *West India* sugars.

So far as my knowledge extends of the cultivation of sugar in *Java*, I have reason to presume the price of 4 dollars *per* picol cannot well be diminished, neither do I conceive there exists any necessity for it should the price of coffee be lower.

The cultivation of sugar in the *West Indies* also is more and more extended; as likewise in *Louisiana*, now belonging to the *United States of America*. In that country it has already increased to 7 million of pounds, and on the lands adapted thereto, it is calculated that 100 million pounds of sugar may be produced, and as they pay no import duties, such exemption may be considered as a premium of 2½ dollars *per* cwt.; from whence it is to be foreseen, that in a few years no other than *Louisiana* sugar will be consumed in this country. After coffee, pepper next comes into consideration, and the cultivation thereof might be encouraged by a diminution of the price at *Pocloe-Pinang*; it was last year sold at 5 or 6 dollars, and on the coast of *Sumatra* for 4 or 5 dollars *per* picol; had they been disposed to encourage that article in

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... it would, in my humble opinion, have been expedient in some measure to equalize the price thereof in future with that at which pepper is attainable at *Poeloe Pinang*, of which it is not difficult to be informed in *Batavia*.

It is neither compatible with sound reason nor commercial policy, that under all the vicissitudes to which commerce, especially in these unprecedented times, is exposed, *Indian* produce should bear the same price, without taking into consideration the altered and perpetually varying circumstances. I, at the same time, too strongly feel how difficult it is for the *India* government perfectly and at all times to be acquainted with the market price of *India* produce, both in *America* and *Europe*; but when apprized thereof, and it is evident that the established prices in *India* bear no proportion to those in *Europe* and *America*, it seems to me, with all due respect, that it ought to be attended either with an advance or lowering of the produce. The *India* government cannot avail itself of any prospects founded on events, within its own knowledge and probability in the present times, subject to too great and speedy vicissitudes, and these events are not as formerly succeeded by the usual consequences.

Political calculations and prospects are now little else than idle chimeras, and the nature of the present war has a more than common influence on commerce; the present (formerly unheard of prohibitions and regulations) are of that description, and so unexpectedly promulgated and again modified, that one cannot rely or confide in any thing in commerce.

Confining myself to the present proposition, I must leave it to the judgment and wisdom of your Excellency to conclude whether the present political situation of *Europe* and *America*, and general state of cultivation of coffee, furnish a favourable prospect, that this product can permanently continue at a high price, should the trade therein be in future exposed to no extraordinary interruptions, vicissitudes, and risks. It then remains for your Excellency to determine whether the exportation of *Java* produce be indispensably necessary to the supply of the various wants of the *East India* colonies, and whether hopes can be entertained thereof under the existing and possible future circumstances, at the present high price of produce.

The data herein before laid down are as accurate as possible in matters of this description; and I trust I employed every possible precaution in the collection of my information.

From

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From this information, I have formed the following calculation, which may, I apprehend, serve as a basis in case your Excellency should hereafter adopt the determination of modifying and regulating the price of *India* produce in *Batavia* by that in *America*.

The price of freights and produce is the present price; the insurance supposed at the usual rate, and not at 15 *per cent.* under which it cannot now be obtained.

Calculation of a commercial enterprise to *Batavia*, by an *American* ship of 350 tons, laden with 5,000 picols of coffee, on delivery in *America* supposed to produce

625,000 lbs. and sell for 23 cents <i>per lb.</i>	Dollars.
amounting to - - -	143,750

C H A R G E S.

Purchase of 5,000 picols <i>a</i> 18 dollars	-	90,000
Insurance on 100,000 dollars <i>a</i> 10 <i>per cent.</i>		10,000
Interest on 90,000 dollars <i>a</i> 7 <i>per cent.</i> for 12 months	- - -	6,300
Import duty <i>a</i> 5 cents <i>per lb.</i>	- -	37,500
If recovered by drawback, it is deducted from the 23 cents, sale value.		
Freight of the ship out and home	-	24,000
Petty charges	- - -	500
Bags 7,000 <i>a</i> 25 cents	- - -	1,750
		<hr/> 170,050
		<hr/>
Loss	-	Dollars 26,300
		<hr/>

A C A R G O O F S U G A R.

5,000 picols in <i>Batavia</i> , calculated here to deliver		
	5,580 quint. of 112 lbs.	
Deduct 5 <i>per cent.</i> tare	- 280	
	<hr/>	dollars
Remain	5,300 quint. <i>a</i> 8½	- 45,050
	<hr/>	

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		dollars
Brought over	-	45,050
CHARGES.		
Purchase of 5,000 picols, at 4 dollars	-	20,000
Insurance on 23,000 <i>a</i> 10 <i>per cent.</i>	-	2,300
Interest on 20,000 <i>a</i> 7 <i>per cent.</i>	-	1,400
Import duty on 593,600 lbs. or 5,300 } quint. <i>a</i> 2½ <i>per cent.</i>	- }	14,840
Freight of a ship of 300 tons, capable } of carrying 5,000 picols sugar	- }	20,000
Petty charges	-	510
		<hr/> 59,050
Lofs	-	Dollars <hr/> 14,000

A CARGO OF PEPPER.

5,000 picols, calculated here to deliver - 610,000 lbs.

The present price is 20 cents *per lb.* in consequence of the suspension of the supply; but when it takes place again, as before, it will fall to the former price of 16 cents, which is thus here calculated, and makes the sales of this cargo amount to

Dollars 97,600

CHARGES.

5,000 picols at <i>Batavia</i> , <i>a</i> 8 dollars	-	40,000
Insurance on 45,000 dollars <i>a</i> 10 <i>per cent.</i>		4,500
Interest on 40,000 dollars <i>a</i> 7.	-	2,800
Import duties on 610,000 <i>a</i> 6 cents.	-	36,600
Freight of a ship of 400 tons	-	28,000
8,000 bags <i>a</i> 25 cents	-	2,000
Petty charges	-	700
		<hr/> 114,600
Lofs	-	Dollars <hr/> 17,000

The *Batavian* picol ought to make here 133 lbs.; but it is found by experience, that by drying, shrinking, dust, &c. it loses on landing in *America*, viz.

On

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On a picol of coffee, from 6 a 8 per C^{me}.

Pepper	-	10
Sugar	-	11

and hereon is the calculation founded :

With regard to the coffee trade in general, I must further remark, that the gross profits formerly obtained therein when the price was lower at *Batavia*, gave rise to the former extensive trade and immense demand for this article down to 1807 ; that the decrees issued in that year by the *French* emperor, on behalf of himself and his allies, the sequestration of *American* ships in the *French* and *Italian* ports, and the general embargo of fifteen months in *America* consequential thereon, caused many coffee traders to sustain losses with which they are still threatened ; that in the town of *Baltimore* alone, 10,000,000 pounds of coffee are yet on hand, and the considerable shipments of this article for *Europe* from most of the *American* ports since the month of *March*, was an enterprize of the most hazardous description, but that many merchants determined thereon, merely with a view to secure their right of drawback ; The impression of the anxiety and losses thereby occasioned will not speedily be effaced, even though the political relations of *America* with *Europe* should take a somewhat more favourable turn, since apprehensions might even then continue to be entertained of a sudden renewal of the former violent and arbitrary decrees, against which, seeing the spirit that now animates the belligerent powers in *Europe*, no pledge is to be found.

I would not, however, be so understood, as if, under the existing circumstances, from the price of *India* produce, the *Java* trade would continue wholly suspended. I have reason to suppose and expect the contrary, from the spirit of enterprize and rashness which sometimes characterise the *American* commerce. I have therefore expressed myself determinately herein, with regard to the former extensive commerce of this country with *Java* ; and I trust that the observations here submitted will be solely applied thereto.

It is for your Excellency to judge whether the wants in *India*, particularly of specie, and the quantity of coffee already collected in the warehouses, has not made the renewal of the former trade of the *Americans*, whereby the annual stock was annually disposed of, a desirable if not indispensable measure. It will not have escaped your Excellency's observation, that, impressed with a conviction of such indispensability, I have exerted myself to propose to your Excellency the only means that can give rise to the renewal of the

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American trade to *Java*, when other favourable circumstances concur thereto.

To expect perfect security for the *American* maritime commerce during the present war would be the height of folly, and nobody flatters himself therewith; but a greater security than they now enjoy may be the consequence of the existing negotiations, should the events in *Europe* favour it; and the moment any reliance can be placed thereon, I shall lose no time in apprizing your Excellency thereof.

I shall leave nothing unattempted to possess your Excellency in general with every event that may have any influence on the *American* trade to *Java*, whenever opportunity offers and they come to my knowledge; I am not, I apprehend, incorrect in the supposition I have formed, that your Excellency will attach importance thereto, by the adoption of measures in *India*, and issuing orders for my direction and information in this country. My commission from his Excellency the minister of marine and colonies, impowers me to expedite such articles as your Excellency may have occasion for; but however conversant I may be in general with the demands of *Java*, I am extremely anxious, in order to the obviating of all mistakes, to be furnished with a special order from your Excellency, seeing the possibility of your Excellency having already contracted engagements in the interim; I shall, when an opportunity offers for that purpose, order the supply, without binding your Excellency to the acceptance thereof.

My commission, recently renewed by his Excellency the minister of colonies, leaves me at full liberty, in proportion to the risk connected with the navigation and trade from hence to *Amboyna* and *Banda*, to fix the price of the spices expressed in my former commission. But I could wish to receive your Excellency's directions on this point also, viz.

Whether your Excellency deems it indispensably necessary to proceed therewith; if so, what quantity and in what proportion on that footing, am I to be at liberty annually to dispose of until further orders, and at what particular prices.

With regard to the latter point, it is calculated here, that spices at *Amboina* (seeing the risk of this navigation, to which the *Americans* have been hitherto unaccustomed, and the increased distance), ought to be charged from 15 to 20 *per cent.* lower than at *Batavia*, with an addition of the difference in the insurance between *Batavia* and *Amboina*.

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This difference is very considerable, chiefly because the *English* may in some measure regard the navigation from hence to *Batavia* as a customary voyage in time of peace, at least so they maintain here; but the navigation to the Moluccas is so universally known never to have been permitted by the Dutch government, that one must expect that an American vessel intercepted in that trade by an English privateer would be liable to confiscation; on this principle it is also that the insurance from hence to *Sourabaya* is higher than to *Batavia*, though not in the proportion of that from hence to *Amboina*.

Intelligence also has been received here that an *American* ship in the *Manilla* trade, bound for *Canton*, has been captured and carried into port by an *English* frigate, on the ground that such voyage was to be considered as comprehended under those prohibited by the instructions of the *English* admiralty, whereby trading from one foreign port to another is not permitted to neutrals.

It was these considerations, which in the present state of affairs I was obliged to avail myself of, that induced me after long negotiations at length to close with the highest offer that was made me for the present expedition.

On enquiry it appears that the last prices at *Batavia* in 1808 were

77 dollars	<i>per</i> picol of Cloves,
218	Nutmegs,
450	Mace,

and I conceived myself justified in taking for same under existing circumstances

40 dollars	<i>per</i> picol Cloves,
125	Nutmegs,
250	Mace,

to be fetched from *Amboina*.

Even at these prices they could not be prevailed upon, notwithstanding the houses interested therein are ranked amongst the first in *New York*, to extend this expedition beyond the sum of 60,000 dollars, on account of the critical state of affairs between *America* and *England*, and the refusal of the insurance company and underwriters of *New York* and *Philadelphia* to insure even this pitiful sum under 40 *per cent.*, which could only be done at *Baltimore* at 25 *per cent.*

It is owing to this premium of insurance that I have been obliged to allow 25 *per cent.* advance on the goods, with regard to

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which I have followed the list of stores for *Amboina*, furnished me at *Batavia*, in the proportions admitted by the capacity of the vessel, those goods regarded by the underwriters as contraband excepted. No reliance is placed here on my specification of the prices of spices in *China* during the four years preceding 1806, they not corresponding with the advices from thence, and they are so far acquainted with the trade in that article as to know that the prices thereof vary considerably in *China*; spices belonging as little there as here to the current articles in trade.

Many *American* traders know by experience how eager people have been at *Batavia* of late years to get rid of their stock of spices, and that they even forced them upon some of them; as the *Americans* have also been repeatedly tempted to be engaged, and some of them actually employed in carrying spices from *Amboina* to *Java* on account of the State, it is no secret to them (so little can we suppose any thing unknown to them relating to the internal state and commerce of our *Indian* colonies) with what expence, difficulties, and risk the transportation is attended.

As the embarkers in the present expedition dispatch it by way of experiment, to see whether they will find a ready and advantageous sale for such a quantity of spices, so also on my part it affords me the means as well of learning your Excellency's further pleasure with regard thereto, as of forwarding your Excellency this dispatch, it not being probable that any other opportunity would offer.

The greatest inducement to this expedition was the hope I held out that the contract entered into between the embarkers therein and myself might possibly be performed at *Sourabaya*, though I was not able in the event to stipulate any augmentation in the price of the spices, some reliance having been placed thereon on making the contract. *Sourabaya* is the port to which the ship is destined, as I insured it to be a fortified and safe birth; in the open sea, it is affirmed, she will outstrip the fastest sailing *English* frigate.

The house of Messrs. *Jacob Le Roy* and Son, of *New York*, have acquainted me with the contract entered into by them with his Excellency Vice Admiral *Buitkins*, for building and dispatching to *Java* two or three fast-sailing armed brigs; the intervening embargo has prevented their performing it, and I did not feel disposed to take upon myself to enter into a further specific negotiation with them with respect thereto; the brig *Goldsearcher*, in
the

A P P E N D I X.

the condition as she proceeds to sea from hence, stands the owner in 18,000 dollars.

The schooner *Nimrod*, of *New York*, which sailed about the 25th of last month, is found to outfail the celebrated pilot boat of that port, which no frigate can overtake; the owners expect to sell this schooner in *Batavia* for a high price.

I trust I fulfil the expectations of his Excellency the minister of colonies, by staying in this country so long, as your Excellency deems my services necessary in *America* for the advantage of His Majesty's colonies in *India*. I shall transmit a duplicate of this and my following correspondence with your Excellency to his Excellency the minister of colonies, and conform myself to his orders.

The brig *Goldsearcher* not being yet ready to sail I shall remain in this city until her departure, for the purpose of noting at foot the last intelligence received from *Europe*.

I have the honour to subscribe myself,

With the most profound respect,

Your Excellency's obedient servant,

(Signed) R. G. VAN POLANEN.

New York, 20th *August* 1809.

Extracted from the Registry of His Majesty's High Court of Admiralty.

Faithfully translated from the *Dutch* language, in *Doffers Commons*, *London*, this 22d day of *January* 1810,

By me,

J. C. A. Gosli,

Not. Pub.

A P P E N D I X.

FORTUNA, *Brasab.*

NOTE to page 236.

ORDER IN COUNCIL, 31st May 1809.

As to the trade
at *Heligoland*.

WHEREAS the island of *Heligoland* surrendered to His Majesty's forces, and is now in His Majesty's possession; His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That the trade to and from *Heligoland* shall be confined to *British* ships, navigated according to law, except in cases where His Majesty may be pleased by His special licence otherwise to permit.

And, for the more effectually preventing any foreign vessel carrying on any trade to or from the said island, contrary to His Majesty's will and pleasure, as by this Order expressed; His Majesty is further pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That no foreign vessel, except as before excepted, shall enter into the port, harbour, or road lying between the island of *Heligoland* and *Sandy Island*, and the shoals of the said islands respectively, and commonly called or known by the names of the North Haven and the South Haven, under any pretence whatever; and that no goods, wares, or merchandize whatsoever, shall be in any manner put on shore in any part of the said Island of *Heligoland*, from any such foreign vessel, or carried from the shore of such island to any such foreign vessel, or in any manner transhipped from any such foreign vessel into any vessel lying in the said harbour, port, or road, or from any vessel lying in the said harbour, port, or road, into any such foreign vessel.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein as to them may respectively appertain.

STEPH. COTTRELL.

A P P E N D I X.

ACTEON, *Mason.*

NOTE to page 257.

Extracted from the Registry of His Majesty's High Court of Admiralty, and invoked from the CAROLINE, Morgan Master, and the GALEN, Bowden Master.

Translations on behalf of the Captors.

An envelope superscribed as follows :

*Robert Smith Esq. Secretary of State,
Washington,*

By Caroline.

United States of America.

In which envelope is contained the following letters :

(Translated from the *French* language.)

To his Excellency the Marquis *De Gallo*, Minister of Foreign Affairs, &c. &c.

Naples, 10th December 1809.

THE number of *American* vessels which have arrived in this port in virtue of the decree of His Majesty in *July* last, which assured them, of the liberty of selling their cargoes, is become an object of great consequence to the interests of the *United States*. Your Excellency will feel the importance that I ought to attach to the welfare of my country, and it is superfluous for me to represent to you how much so long an uncertainty prejudices all those whose confidence has conducted them hither. I have too great reliance in the wisdom of this Government to doubt for a moment that this affair will be speedily taken into consideration.

The knowledge I have, above all, of your Excellency's enlightened notions, assures me that you will properly represent to His Majesty that a longer uncertainty would be an incalculable injury to all *American* individuals who have property in this country.

I have

No. 1.

A P P E N D I X.

I have also to observe to your Excellency, that if even we were at war (which I hope will never take place), vessels *bonâ fide* arrived could not be subject to an unforeseen change in politics. The importance of this affair in conjunction with my duty will serve as an apology to your Excellency for the continual trouble I give you.

I beg you will accept that apology, and with it the distinguished assurances of my very high consideration.

ALEX. HAMMETT,
Consul of the United States.

Naples, 17th December 1809.

No. 2.

I HAVE the honour to remit to your Excellency a detailed note of *American* vessels that have arrived in this port, with the respective epochs of their arrival, and a specification of the articles with which they are laden.

I flatter myself that I know too well how highly your Excellency values the prosperity of your country, and that good faith which alone can make it flourish, to doubt that you will be pleased to represent to his majesty the king of the *Two Sicilies*, the painful situation the *Americans* are in who have come hither in consequence of an invitation which assured them a liberal commerce with this kingdom.

I beg your Excellency to be assured of the sentiments of high consideration with which I have the honour to be, &c. &c.

ALEX. HAMMETT.

No. 3.

To his Excellency the Marquis *De Gallo*, Minister of Foreign Affairs, &c. &c.

Sir,

Naples, 5th January 1810.

I HAVE just learned that the Government has ordered the sale of several *American* vessels for the benefit of the Exchequer; as I am unacquainted with the motives, I beg your Excellency will be so kind as to inform me of them. I seize this opportunity to reiterate to your Excellency the assurance of my very high consideration.

ALEX. HAMMETT.

A P P E N D I X.

To his Excellency the Marquis *De Gallo*, Minister of Foreign Affairs, &c. &c.

No. 4.

Naples, 16th January 1810.

THE undersigned Consul of the *United States* had the honour of addressing a note to his Excellency the Marquis *De Gallo*, Minister of Foreign Affairs, under date of the 13th instant, to which he refers himself. He finds himself this day under the necessity of expressing to him his grief concerning the fate of the *Americans*, whom confidence had conducted to this country, and who, by an unexpected train of measures which the Government has adopted against their property, find themselves reduced without resource or credit. Fully relying, however, on the provident loyalty of his majesty the king of the *Two Sicilies*, and on his government, the undersigned flatters himself It will have foreseen the case stated, and provided the proper remedies, as well as the means of their re-imbarkation for their country. He confidently waits for a favourable answer to this note as well as to the former.

He prays his Excellency the Minister for Foreign Affairs will accept the assurances of his high consideration.

ALEX. HAMMETT.

To the same.

No. 5.

Naples, 20th January 1810.

Alexander Hammett, Consul of the United States of America at *Naples*—

To his Excellency the Marquis *De Gallo*, the Minister of Foreign Relations.

Entrusted with the communications of my government to that of *Naples* I have thought it my duty to protest, in the name of the United States, against the sales effected here of *American* vessels and property which came direct, and also those that have been seized on these coasts. I beg your excellency will receive this act, as well as acknowledge the receipt thereof.

I have the honour to subscribe myself ever,

ALEX. HAMMETT.

APPENDIX.

Naples, 20th January 1810.

IN consequence of the sales effected here of sundry *American* vessels with their cargoes; vessels that have been seized on these coasts though carrying *American* colours have been declared lawful prize, and also others which came direct.

As no change whatever has taken place in the relations between the Government of the *United States* and the *French* Government, so far as is known to the Consul of the *United States of America*;

As no particular circumstance whatever could have influenced to declare them lawful prize;

As these vessels were addressed to *Naples* under the guarantee of the invitation of his majesty the king of *Naples* and *Sicily*, to introduce into these ports goods on condition of exporting the produce of this kingdom;

As the contents of the cargoes were furnished with certificates of origin in due form;

We the undersigned, *Alexander Hammett*, consul of the *United States of America* at the court of *Naples*, the public rights of man having been violated and confidence abused, we demand, in the name of our Government, and to acquit ourselves of the duties of our employment,

1st, That all the proprietors be reimbursed the amount of the articles sold.

2d, That there be returned to them all the vessels hitherto illegally sold, as also those that remain, as well as the goods in existence.

3d, That they be indemnified for all loss, damage, &c.

Of which we draw up this general protest against all that may be the consequences of these measures.

ALEX. HAMMETT,

Consul of the *United States*.

No. 6. To his Excellency the Marquis *De Gallo*, Minister of Foreign Affairs, &c. &c.

Naples, 24th February 1810.

THE undersigned, Consul of the *United States of America*, still finds himself, and with grief, without an answer to the five notes which he had the honour to address to his Excellency the Mar-

quis

A P P E N D I X.

quis *De Gallo*, Minister of Foreign Affairs, relating to the unexpected measures adopted by this Government against the commerce of *Americans*, who came here under the protection of existing treaties, and the declaration of his majesty issued on the 1st *July* last.

The consequences attending so wise a measure announced the most happy results for both nations.

The undersigned has not seen them vanish but with pain, and being forced this day by imperious considerations, and by the sad situation, to which about three hundred individuals of his nation find themselves reduced, thinks it his duty to regulate his conduct by positive data, (which he expects from the frank politics of this Government,) as also the measures which he adopts for furnishing indispensable subsistence to this great family, henceforth reduced without resource as well as without credit in this place. This matter is positively urgent, and he begs his Excellency the Minister for Foreign Affairs to take it into his serious consideration, as also the means of transporting them to their country.

The undersigned has the honour to reiterate to his Excellency the Marquis *De Gallo* the respect of his high consideration.

(Signed) · ALEX. HAMMETT.

The Minister for Foreign Affairs of his majesty the king of the *Two Sicilies*, to M. Hammett, Consul of the United States of *America*.

No. 7.

Sir,

Naples, 9th March 1810.

I HAVE not failed, Sir, to render an account to his majesty of the reiterated demands that you have made to me in favour of the *American* vessels and subjects now remaining in the ports of his states. The king has not seen without sorrow the small conformity which is found between your solicitations and the principles adopted by the Government of the United States, and manifested in its resolutions contained in its act of the first of *March* last year against the commerce of *France* and the States attached to the political system of the *French* empire; after which you ought not to be surprized at the rigorous measures the king has seen himself obliged to take against the vessels of your nation, which, besides, are loaded with prohibited merchandize.

As

A P P E N D I X.

As for the *Americans* composing the crews of the confiscated vessels, his Majesty has given orders to his Minister of Marine to procure them an embarkation to return to *America*. I flatter myself that the changes which your Government may be enabled to make in Its resolutions, may lead his Majesty to measures more conformable to his wishes, and to the sentiments of friendship and good understanding which the King desires to be enabled to cultivate with the United States of *America*.

Mean while please to accept the assurance of my very distinguished consideration.

The Marquis DE GALLO.

FAITHFULLY translated from the *French* language by me the undersigned, at *London*, 8th day of *June* 1810.

which I attest,

J. DE PINNA, Not. Public.

ARDEN, Registrar.

EXTRACTED from the minutes of the Secretary of State's office at the palace of *Warsaw*, 25th *January* 1807.

NAPOLEON, Emperor of the *French*, King of *Italy*.

IN our decree of the 21st *November*, which declares the confiscation of all *English* merchandize, in whatever hands they may be found; in our decree of the 15th of *December*, which orders that all *English* merchandize or property in *Hamburg* and the *Hanse Towns* should be sent into *France*,

We have decreed and do decree as follows;

Article 1. The merchandize subject to confiscation under our decree of the 21st of *November*, shall be deposited in a magazine appropriated for that purpose, under the custody of a *French* custom-house officer.

2. An inventory will be taken of them, which will be addressed to our Intendant General, a copy of which he will transmit to our Minister of Finance.

3. Colonial produce, materials of the first necessity to the manufactures, fine stuffs, and articles of costly workmanship, shall be

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be sent into *France* under the direction of our Minister of Finance, and subject to his disposal.

4. Provisions, liquors, stuffs fit for the use of the army, and other useful articles, shall be placed in the military magazines.

5. The more bulky merchandize, such as iron, wood, coals, beer, and earthen ware, shall be sold on the spot where they have been sequestrated.

6. The produce of the sales made in the territory of the army shall be added to the general account of contributions, and that of the sales made in *France* to the sinking fund.

7. Our Minister of Finance, and our Intendant General, are charged with the execution of this decree.

(Signed) NAPOLEON.

By order of the Emperor,

The Secretary of State, HUGUES B. MARET.

(a true Copy)

The Intendant General of the Army,

DARU.

FRENCH EMPIRE.

Bremen, Monday, October 26. The *French* Consul at *Bremen* to his Excellency the Burgomaster, President of the Senate of this City.

Sir,

I AM eager to inform you, that it is the intention of his Majesty the Emperor and King, my august sovereign, that all navigation upon the *Weser* be prohibited. It is his Majesty's desire that all vessels, even *French*, entering the *Weser*, be stopped, provided they are wholly or partly laden with colonial produce, or any other goods, of whatever kind, that *England* can furnish. The goods are to be put under sequestration and taken in charge until new orders. Vessels laden solely with merchandize, which it is impossible *England* can furnish, such as pitch, tar, iron, copper, and *French* wines, are to be exempted.

All vessels are to be prevented from leaving the *Weser*. I am finally ordered to take the most efficacious measures that the intentions of his Majesty be strictly and immediately fulfilled.

I am

A P P E N D I X.

I am now occupied in executing these orders, and hasten to warn you thereof, in order that you may immediately inform the merchants of this city, that they attempt not to render ineffectual the measures taken for the rigid and proper execution of the orders of my sovereign. I avail myself of this opportunity to express your Excellency the homage of my respect.

(Signed) LAGAN.

NEUTRAL COMMERCE.

Hamburg, Nov. 4th, 1807.

AT the request of the merchants here, dealing with the *United States*, I have issued the annexed circular instructions to the masters of such of our ships as may be bound to this city; and have also sent over to *Heligoland* an agent, who will remain there for some months, in order to communicate such further information as I find expedient to convey to our countrymen passing that island. You, Sir, will make such use of these circumstances as the interest of our commerce may point out to your known zeal and discretion.

I am, very respectfully,

Your most obedient servant,

W. Lyman Esq.

J. M. FORBES.

Consul of the United States of *America*, &c.

London.

American Consulate, Hamburg, Nov. 4th 1807.

To Masters of *American* ships bound to *Hamburg*.

IN the present unprecedented crisis, such great and almost daily changes take place, and the measures of the belligerents affecting commerce are put into such immediate operation, that it is impossible for the most prudent, with the best intentions, to avoid the injuries which on every side lie in wait for fair neutral trade. It is therefore by no means my intention to assume any controul in the destination of your ships, but merely to state such facts as it is important you should know. In this measure my own opinion has been fortified by those of the most respectable merchants here in connection with my country, expressed to me in their written request.

The

A P P E N D I X.

The *French* custom-house officers (or douaniers) without any official intimation to the foreign agents here, have, some time since, in virtue of an imperial decree, applied the commercial regulations and laws of *France* to the trade of this city, and without any exceptions require certificates of origin signed by the *French* consul at the place of shipment, for all articles attempted to be introduced here. In addition to the inconveniences which the prompt and unexpected execution of this measure presented; within a few days a new order of the *French* Emperor has interdicted, in the most rigid manner, the navigation of the *Elbe* and *Weser* to all ships, whether going or coming, and in consequence of it, the *American* ship *Julius Henry*, coming from *Baltimore*, has been seized, and the cargo has been sequestrated; the ship has been liberated, but without any freight, and must remain under an embargo, of which the term cannot be foreseen. Under this state of things it must occur to every one, that it cannot promote the interests confided to you to enter either of these rivers. Having stated thus much, I can only leave you to follow the dictates of your own prudence, assuring you that I shall endeavour to send you new advices by the 1st of *December*, or sooner, if any favourable change takes place.

(Signed) J. M. FORBES,
Consul of the United States of *America*.

List of articles permitted to be imported into *Hamburgh* with certificate of origin, signed by the *French* consul at the place of shipment;—timber, masts, iron, copper, hemp, sail cloth or raven duck, flax, cordage, pitch, tar, wheat, rye, barley, oats, oatmeal, peas, beans, rice, flour, cheese, butter, wine, brandy, tallow, candles, salt, pot-ash, flax seed, madder, turnip seed, linseed oil, hemp oil, whale and other fish oils, fish glue, mats, horse hair, hogs' bristles, saltpetre, yellow wax, bed feathers, caviar, and honey.—All other articles are for the present prohibited.

APPENDIX.

GERMAN PAPERS.

New Decree against *British* commerce.

EXTRACT from the Minute Book of the office of the Secretary of State.

Palace of *Pontainblau*, Nov. 13th, 1807.

We, *Napoleon*, Emperor of the *French*, King of *Italy*, and Protector of the confederation of the *Rhine*, upon the report of our Minister of Finance, have decreed and do decree as follows:

Article 1. The enactments of our Imperial Decree of the 6th of *August* 1807, are applicable to the cargoes of vessels which may arrive in the mouth of the *Wefer*; those articles of merchandize, therefore, specified in the second article of the said decree, shall be seized and confiscated, and all colonial produce shall be accompanied by certificates of origin, delivered by our commercial commissaries at the different ports where they were taken on board.

2. Our commercial commissaries shall not confine themselves in their certificates merely to attest that colonial productions neither came from the colonies of *England* nor belong to her commerce; they shall also point out the place of their origin, the papers which have been submitted to them in support of the declaration made to them, and the name of the ship on board which they have been originally transported from the place where they were produced to that where the commissaries reside; they shall address duplicates of their certificates to the Director General of the Customs.

3. All ships which, after having touched at any *British* port on any account whatever, shall arrive in the mouth of the *Elbe* and of the *Wefer*, shall be seized and confiscated together with their cargoes, without any exception or distinction of produce or of merchandize.

4. The captains of ships arriving in the mouth of the *Elbe* or of the *Wefer*, must make declaration to the chief officer of the imperial customs on that station, of the place from which they sailed as well as of those which they touched at, and shall deliver to them their manifest, bills of lading, sea-papers, and registers. When the captain shall have signed this declaration and delivered up his papers, the custom-house officer shall interrogate the sailors

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one by one in the presence of two head collectors; if it appear from this examination that the ship has touched at an *English* port, beside the seizure and confiscation of the ship and cargo, the captain as well as those of the sailors who upon their examination have made a false declaration, shall be made prisoners, and shall not be liberated till after paying a sum of six thousand francs by way of penalty for the captain, and a sum of five hundred francs for each of the arrested sailors, in addition to the penalties incurred by those who falsify their sea-papers and registers.

5. If the advices and information communicated to the Director of our Customs resident at *Hamburg*, excite suspicions with regard to the origin of the cargoes, they shall be provisionally deposited in warehouses till it has been ascertained and decided that they came neither from *England* nor from her colonies.

6. The line of officers of the customs formed upon the *Elbe* and the frontiers of *Holstein*, shall be augmented by one hundred men. The Director General of our customs shall give the necessary orders for placing overseers, detached from that line, at the ports situated on the mouth of the *Weser*, and for their exercising the strictest inspection of all ships which shall approach.

7. The Inspectors of customs are authorized to make visits to the Isle of *Neuwark*, and to the *Wats*, or other little isles situated in the mouths of the *Elbe* and *Weser*.

8. The commandants of troops of the line and of the Gens d'armes are bound to lend their aid to these Inspections, as often as they shall be required to do so by the chief custom officers of the district.

9. Our Ministers of War and Finance are charged, each in his own department, with the execution of this decree.

(Signed) NAPOLEON.

Hugues B. Maret, Secretary of State.

(A true Copy) *Gaudiu*, Minister of Finance.

(A true Copy) *Colleir*, Director Gen. of the Customs.

(A true Copy) *Fudel*, Director of the Customs.

APPENDIX.

DECREE against *Swedish* Commerce.

IN consequence of our present relations with *Sweden*, his Majesty yesterday passed the following decree :

Louis Napoleon, by the grace of God and the constitution of the kingdom, King of *Holland* and Constable of *France*.

Whereas we have received information that the orders adopted relative to the blockade of the *British* islands have not been carried into execution with like force against *Swedish* ships : And whereas this kingdom is equally at war with *Sweden* and *England* :

We have decreed and hereby decree as follows :

Article 1. Every *Swedish* ship which shall enter the ports of this kingdom shall be immediately seized, and also all *Swedish* merchandize shall be confiscated.

2. All *Swedish* subjects who may have heretofore exercised diplomatic functions within our kingdom, or who may have served as Consuls or Commercial Agents, and who still remain in *Holland*, are required to leave the kingdom immediately upon the publication of this decree.

3. All other *Swedish* subjects, who may be found in our ports or other parts of our kingdom, shall immediately be arrested and treated as prisoners of war.

4. The measures at present in force for the blockade of the *British* islands, shall in like manner and without exception be made applicable to *Sweden*.

5. Our Ministers of Finances, Justice, and Police, are charged with the execution of the present decree, which shall be proclaimed at all places where its publication may be necessary.

Given at *Utrecht* this 18th day of *January* in the year 1808, and of our reign the third.

(Signed) LOUIS.

By his Majesty's command,

J. H. Appellius,

Secretary of the Council of State.



A P P E N D I X.

Amsterdam, July 4th, 1809,

DECREE of the 30th June.

AMERICAN vessels arriving within three months from the date hereof, and those already arrived, shall not be subject to the regulations of blockade, provided the same have not been in *England*, nor visited by the enemy. All captains shall make a declaration conformable to this article, and in case of prevarication the ship and cargo to be confiscated.

As far as the cargoes shall appear to be conformable to the existing regulations, the same shall be placed at the disposal of the proprietors or consignees, the remainder shall be sequestered, and deposited in the king's warehouses.

Another DECREE of the same date.

Article 1.—The list of articles allowed to be imported by the article of 31st *March*, shall be extended to the following ;—rice, staves, barks and other drugs used in medicine, cottons, *Georgia*, *Louisiana*, and *Carolina*, *Java* coffee, sugar from the same island.

2. Besides the certificates of origin required by our former decree, the director afloat, for the purpose of executing the same, shall appoint sworn brokers to examine the goods, to ascertain if they really are the produce of our colonies or of the *United States* ; and for the better means of examination, all goods shall be landed in the king's warehouses.

3. A month from the date hereof, our said director shall report to us, whether it be adviseable to continue these measures.

JOHAN,

A P P E N D I X.

JOHAN, *Abraham.*

L.

NOTE to page 275.

ORDER IN COUNCIL, 2d *May* 1810.

Restriction as to
fishing vessels
clearing out
from ports from
which the *British*
flag is excluded.

HIS Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, That all vessels which shall have cleared out from any port so far under the controul of *France* or her allies, as that *British* vessels may not freely trade thereat, and which are employed in the whale fishery, or other fishery of any description, save as herein-after excepted, and are returning or destined to return either to the port from whence they cleared, or to any other port or place at which the *British* flag may not freely trade, shall be captured, and condemned together with their stores and cargoes, as prize to the captors.

Vessels carrying
fresh fish to
market excepted
sub modo.

But His Majesty is pleased to except from this Order vessels employed in catching and conveying fish fresh to market, such vessels not being fitted or provided for the curing of fish.

Vessels sailing
previous to
notice of this
order, not to
continue on their
fishing more
than 20 days
after due warn-
ing received at
sea.

And it is further ordered, That all vessels subject to the provisions of the Order as aforesaid, which shall have sailed on their present voyage previous to notice of this Order, or reasonable time for notice thereof, shall be permitted to return to their own port, without molestation on account of any thing contained in this order; provided they shall not have continued on their fishery as aforesaid more than twenty days (which are hereby allowed to such vessels) after due warning of this Order received at sea. And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and Judges of the Courts of Vice Admiralty, are to take the necessary measures herein as to them may respectively appertain.

(Signed) W. FAWKENER.

SAN

A P P E N D I X.

SAN FRANCISCO DU PAULA.

N.

NOTE to page 279.

EXTRACT from the *Cadiz Commercial Gazette* of the 5th
September 1809.

THE most excellent *Senhor Don Francisco Saavedra*, minister of the royal revenue, has transmitted to this consulate, under date of the 27th *August ultimo*, the following royal Order :

When *Don Joseph Lorez Martinez*, late Prior of your consulate, in the name of that body, stated various observations with a view of obtaining permission to insure treasure proceeding from *America* belonging to the subsidy department (to which His Majesty hath not thought fit to accede) ; he also suggested the great expediency of regulating the subject of reprisals, in order to obviate all injury and subject of complaint. In consideration of which, the supreme central junta of the kingdom ordered, that the necessary official letter should be addressed to the secretary of state on so interesting a subject, and in consequence thereof he has been pleased to inform, that the following article had been agreed upon between the minister of His *Britannick* Majesty, and that of His Catholic Majesty in that court, which has been ordered to be carried into effect in the following terms :

All ships or goods belonging to one of the two contracting powers shall be reciprocally, and in all cases (save those hereafter excepted), restored to their former owners or proprietors on payment of a salvage of one eighth part of their true value, if recaptured by a ship of war, and one sixth part if recaptured by a privateer or other ship or vessel. And in case such ships or goods have been recaptured by the united force of one or more ships of war, or of one or more private vessels, then the same shall pay a salvage of one sixth part ; but if such ships or vessels so recaptured shall appear, after capture by the enemy, to have been fitted out as ships or vessels of war, such ship or vessel shall not be restored to its former owners or proprietors, but shall in
all

A P P E N D I X.

~~all~~ ^{all} ~~cases~~, whether recaptured by a ship of war, privateer, or any other vessel, be declared lawful prize to the benefit of the captors.

I transmit this to you by order of His Majesty, for your government and direction, the ~~same~~ being, by order of the tribunal, published for the information of the merchants.

LUCAS HONTANON,

Secretary.

Cadix, 2d September 1809.

R E P O R T S

OF

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY, &c. &c. &c.

GOEDE HOOP, PIETERS.

Nov. 7th,
1809.

THIS was a leading case, and became of importance, as it furnished the Court with an opportunity of stating generally the principles by which its decisions would be governed in questions arising on the capture of vessels sailing under *British* licences. The ship was chartered at *Maremmes*, to proceed in ballast to *Rochelle*, and there to take on board her present cargo; she arrived at *Rochelle* on the 1st of *April* 1809, and completed her lading on the 13th *May*, but did not sail until the 29th *June*, on which day she was captured, as the licence had expired. The excuse set up was, that the ship was detained after her cargo was on board by an embargo, which had been imposed by the *French* Government; and that for some days after it was taken off, she was prevented from sailing by contrary winds.

Expired licence
—Parties having
used due dili-
gence, but pre-
vented by acci-
dents not within
their control from
carrying their
intentions into
effect within the
time—entitled to
protection.

The
CORDE HOOP.

Nov. 7th,
1809.

JUDGMENT.

Sir *William Scott*.—This was the case of a vessel under *Oldenburgh* colours, which was captured in the prosecution of a voyage from *Rochelle* to *Hull*, and brought to *Plymouth*. There was a licence on board granted to *Henry Nodin*, on behalf of himself and other *British* merchants, for four vessels under particular colours which are enumerated, to proceed with cargoes of brandies from *Charente*, *Bordeaux*, or any port of *France* not blockaded, to any port of *Great Britain*, and permitting the masters to receive their freights, and depart with their vessels and crews. The licence is dated 15th *November* 1808, and is to remain in force six months from that period; now the ship was taken the 29th of *June* last, and, therefore, according to the literal construction of the licence, after the time had expired, during which it was to continue in operation.

This question has led to some discussion on the rules of interpretation to be applied to licences generally, and as those rules will of necessity embrace a great variety of cases, it is extremely desirable that they should be settled now, as far as this can be done by the authority of this Court. These licences owe their origin to the general prohibition, which declares it to be unlawful for the subjects of this country to trade with the enemies of the King without his permission; for a state of war is a state of interdiction of communication: *that* is a law which is not peculiar to this country, but one which obtains very generally among the States of *Europe*. In former wars this prohibition was attended with very little inconvenience, as the greater part of the countries in the neighbourhood remained neutral, and presented to the belligerents various channels of communication, through which they

they obtained from each other such commodities as they stood in need of. While the world, therefore, continued in that state, of course licences would be granted only in very special cases, where it appeared that there was a necessity to have a direct communication with the enemy; and being matter of special indulgence, the application of them was *strictissimi juris*. At the same time, when I so describe them, I do not mean to say, that there ever was a period in which a rational exposition, allowing a fair and liberal construction of the intention of the grantor, would not have been received. There never was a period, for instance, in which it could have been contended, that the words "six months" were subject to such a strict and literal interpretation, that a failure, arising from circumstances which the party could not control, would have the effect of vitiating the licence, where he could shew that he had used all due diligence, and was prevented from completing the voyage within the time by embargoes in foreign ports, or by the fury of the elements. These are accidents which prejudice no person, and therefore I presume the time never existed when the party would not have been at liberty in this Court to alledge such facts, and when he would not have been entitled to a virtual protection from its decisions, although the terms of the licence were not literally complied with. While he was baffled by these obstructions, the intervening time was, as it were, annihilated, and he was to be put again in possession of the time so lost. That interval, in which he was not at liberty to act was, in fair construction, no time as to the operation of the licence. It was a construction founded on the intention of the grantor, that where a party had acted with good faith, and had complied with the terms prescribed, as nearly as controuling

The
GOLDE HOOP.

Nov. 7th,
1809.

The
GOEDE HOOP.

Nov. 7th,
1809.

circumstances would permit, he should have a fair indulgence respecting those points in which he had been prevented from a literal performance, by obstructions which he could neither foresee nor obviate. This was the rule of interpretation when licences were even matters of special indulgence.

But it has happened, that in consequence of the extraordinary and unprecedented course of public events, these licences have, in a certain degree, changed their character, and are no longer to be considered exactly in the same light. It is notorious, that the enemy has in this war directed his attacks more immediately against the commerce of this country than in former wars; and a circumstance of still greater weight is, that he has possessed himself of all those places that in former wars remained in a state of neutrality. To what part of the continent can we now look for a country, which is not either under the actual dominion of *France*, or in that state of subjection to it, which operates with all the effect of dominion? It is a state of things in which it has become impossible for *England* to carry on its foreign commerce, without placing it on a very different footing from what its convenience required in former wars. To say that you shall have no trade with the enemy, would be in effect to say, that you shall not trade at all, because that commerce which is essential to the prosperity of the country, cannot be carried on in those small and obscure nooks and corners of *Europe*, if any such can be found, which are still independent. The question then comes to this, How is the foreign commerce of the country to be maintained? It must be either by relaxing the ancient principle entirely, and permitting an unlimited intercourse with the ports of the enemy, and where the ports of other nations are

put

put under blockade (as they are by the Orders in Council) for other reasons than those of a direct hostile character, they become liable to be considered and treated in like manner, so far as the purposes of blockade require; or it must be by giving a greater extension to the grant of licences. As to the relaxation of the general principle, by which an open and general intercourse with the enemy would be allowed, the consent of both parties is requisite to make that effectual, and even if the enemy permitted it, the legislature would probably not think proper to proceed to that length, and for reasons, I presume, connected with the public safety. It has therefore tolerated a resort to the other mode of permitting a trade by licences, which, though they are so denominated, are likewise in effect expedients adopted by this country to support its trade, in defiance of all those obstacles which are interposed by the enemy. They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms; requiring, therefore, an enlarged and liberal interpretation. At the same time, they are not free from control; restrictions dictated by prudent caution are annexed, and where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this Court to apply such an interpretation to a licence, as would be in direct contradiction to its express terms, or to say that effect should be given to one part, and not to another. If the permission is for a ship to go in ballast, it would be impossible for the Court to say, that it shall go with a cargo; for that would be not an interpretation, but a contravention of the licence. But where it is evident that the parties have acted with

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perfect good faith, and with an anxious wish to conform to the terms of the licence, I presume that I am only carrying into effect the intention of the grantor, when I have recourse to the utmost liberality of construction, which it is in the power of this Court to apply. As a general rule, therefore, it is to be understood, that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal execution, by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled. If I assume too much in laying down this rule, it must be rectified in the superior Court; but looking to the intentions of the Government, not only to what they are, but to what I am led to suppose they must be; looking to the extreme difficulty of carrying on the commerce of the country in the struggle which it has to maintain, not only against the power, but against the craft of the enemy; looking to the frequency and the suddenness with which He lays on or takes off his embargoes, according to the exigency of the moment; looking to the various obstructions that present themselves in obtaining vessels, in consequence of the small remainder that there is of neutral navigation in *Europe*; looking also to this circumstance, that all this intercourse must be carried on by the subjects of the enemy, that it must be a confidential transaction to be conducted by an enemy shipper at great risk and hazard to himself; looking to the total change which has taken place in the nature and character of these licences, if that denomination is to be continued: I say, looking to all these considerations, where there is clearly an absence of all fraud, and of all discoverable induce,

inducement to fraud, I must go to the utmost length of protection that fair judicial discretion will warrant, though there may, under such circumstances, have been a considerable failure in the literal execution of the terms of the licence. There may be great inconvenience in the whole system of licences, as indeed it is scarce possible, in the present state of the world, that there should not be great practical inconvenience in any mode of conducting its commerce. That is a question of policy with which this Court has nothing to do: It has only to enforce the just execution of legitimate orders issued by competent authority.

Having laid it down, therefore, as a general principle, that where there is clear *bona fides* in the holder, this Court, though it certainly will not contravene the terms of a licence, will give it the most liberal construction—I come now to apply that rule to the case before me. The principal ground of objection is, the delay which took place in the sailing of the vessel; but I must observe, that having called on the Counsel for the Captors to point out what particular fraud could have been intended by this procrastination, I have only been answered by a sort of general suggestion, that such an extension of the period allowed might afford an opportunity of bringing the licence into use a second time. But that any such use was made, or intended to be made, of the licence, in the present instance, has not been suggested, and, therefore, it is to be taken as a case clear of that act or intention of fraud. It is objected to the master, that he did not produce his licence to the captors, and that, on his arrival at *Plymouth*, he delivered certain papers and documents to his agents there. But it is impossible not to take into consideration the difficulties under which such persons labour; they are persons

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exposed to great harassments both on the one side and on the other. They know that they are embarked in transactions of great confidence and mystery, requiring the utmost care and circumspection, and they are to pick their way, in fear and silence, walking, as it were, at every step, over burning plough-shares. That, under such circumstances, there should have been something of reserve in the conduct of this neutral master, is not very much matter of surprise, or of serious judicial animadversion. As far as can be collected from the contents of the papers, no fraud seems to have been meditated in keeping them back; and I dwell the less upon this objection, because it is one which the captors have no right to take in this case, as it appears that they have not done their duty in bringing in the papers in a regular manner. It is the known duty of the prize-master to take possession of the ship's papers, and, upon his arrival, to make an affidavit and bring them in; but here they were left in the custody of the master of the ship. When the ship comes into port, does the prize-master demand them?—no, that was not done; they are brought in some days afterwards by a person of the name of *Smith*, who describes himself as the agent of the agents of the captors. If, therefore, any papers were kept back, it is a fault of which the captors have no right to complain; there is an end of any objection that can proceed from that quarter, as to an unfairness in the production of the papers. But these papers are such as the master could not have any interest in withdrawing; and, therefore, there is not much in the substance of the objection. The account given by the master is, “that the vessel sailed from
“ *Marennés*, in *France*, in the month of *March* last,
“ where she was chartered to proceed in ballast to *Re-*
“ *cbelle*, there to take on board her present cargo; that
“ the

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“ the said ship sailed from *Marennés*, aforesaid, on the
 “ 28th of *March* last, and arrived at *Rochelle* on the 1st
 “ of *April* following; and in the same month began to
 “ take on board her present lading, and completed
 “ the same on the 13th of *May* following. That the
 “ said ship sailed from *Rochelle* aforesaid, being her
 “ last clearing port, previous to the capture on the
 “ 29th *June* last, having been detained from sailing
 “ after her cargo was on board, by means of an em-
 “ bargo by the *French* Government, and for some
 “ days by contrary winds.” It is said, that this was
 a very long time, and so it is; and it is a long time
 which the Court is under the necessity of allowing on
 account of the immense difficulties which are to be over-
 come. You cannot generally send ships from *England*,
 and they must therefore be procured as they may in
 ports of the enemy. This ship was chartered in an
 enemy’s port, and as there must have been a good
 deal of previous correspondence, it is not surprising
 that a considerable time elapsed before the business
 was concluded. The ship sailed from *Rochelle* on the
 21st *June*, and was taken on the same day. Now,
 the whole labour of the argument has been employed
 to shew, that some fraud or other must be presumed,
 from the length of time which elapsed after the ex-
 piration of the licence. But what is the natural pre-
 sumption in this case? why, that the party would not
 countenance an unnecessary delay, which must be con-
 trary to his own direct interest. This furnishes a very
 strong ground to suppose, that it was by accident that
 the ship was prevented from completing her voyage
 within the time expressed in the licence. If it could
 be shewn, that the licence had been used before, and
 that the delay in the present instance arose from its
 previous use, or that there was any other fraudulent
 purpose

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purpose to be answered, most certainly, I should then call for more particular explanations ; but as no fraudulent motive has been pointed out, I must suppose that the party was not dilatory in furthering the completion of his own mercantile adventure. The only thing suggested is the fact that the time limited by the licence had expired. That has been accounted for by the intervention of an alledged embargo. Shall I, under these circumstances, order the fact of the embargo to be established by further proof, when it is so probable in itself, and load this table with *French* decrees and ordinances, which would, after long delay, in all probability, lead to the same conclusion at last? Looking to the local circumstances of the country in which the transaction originated, and to the conduct of the *French* Government at that particular period, I think it my duty to stand upon the presumption, that the embargo did exist, and to hold the parties entitled to restitution, paying the captors their expences, which I cannot refuse, where the parties are acting in apparent contravention of the literal terms of their licence. In such cases His Majesty's Officers have a right to be satisfied, and they are entitled, in justice, to be protected in their expences. It is an inconvenience not arising from capture, but from the present state of affairs, and from which the Court cannot relieve the claimants, however it may regret that they should be subjected to it. The licence, I observe, is only to bring a cargo of brandy, and as there are other goods on board, those goods must be condemned, as the permission is limited to the brandy.

CATHERINA MARIA, BRATHERING.

Nov. 7th,
1809.

THIS was the case of a vessel under *Mecklenburgh* colours, which was captured on a voyage from *Rostock* to *Liebau*, with a cargo of wine and brandy.

Licence to proceed in ballast to a port of the enemy for the purpose of bringing a cargo from thence to this country, will not protect the vessel carrying a cargo to the port of the enemy.

7th Jan. 1807.

JUDGMENT.

Sir *William Scott*.—I can have no doubt that this vessel is liable to condemnation under the Order in Council, which prohibits all trade between ports from which the *British* flag is excluded. Protection is indeed contended for by virtue of a licence found on board at the time of capture, permitting a vessel, bearing any flag except the *French*, to sail in ballast to any port in the *Baltic* or the *White Sea*, for the purpose of bringing a cargo from thence to this country. But that will certainly not enable the vessel to carry a cargo to the port of the enemy. The ulterior branch of the voyage, the voyage to this country, is that alone wherein the vessel is permitted to carry a cargo by the terms of this licence, and having been captured with a cargo on board during her voyage to the *Russian* port, it cannot be said that she is to derive protection from it. There would be an end of the Orders in Council, by which the trading between the ports of the enemy is prohibited, if their effect could be taken off by proceeding to such ports with cargoes, with the ostensible purpose of an ulterior voyage to this country. It has therefore been made a general condition of these licences, that a vessel on her voyage to the enemy's port shall go in ballast, unless she is proceeding from some open port. And although it has been argued, that the first branch of the voyage is of subordinate consideration, I cannot take upon myself to overlook this

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this consideration, and to say, that a licence permitting a vessel to proceed to an enemy's port in ballast shall extend to the protection of a vessel proceeding thither with a cargo. If, as it has been observed, the object of obtaining naval stores from *Russia* is of such high importance to this country as to overcome every other consideration, the terms of these licences may, upon proper representation, be altered by His Majesty's Government; but it is not within the competence of this Court to make such alterations, or to relieve the claimants, by giving to the terms of a licence an interpretation evidently not within its meaning.

Then again it has been urged, that the *French* authorities at *Rostock* compelled the master to take this cargo on board. I must observe, in the first place, that this suggestion comes out in a manner not much calculated to inspire implicit confidence in the mind of the Court; but were it otherwise, such an excuse can never be admitted. What is to become of these Orders in Council if the enemy, by the mere introduction of a force which the master of a merchant vessel cannot resist, is to defeat their operation? force would in all cases be employed, and in many cases collusively. In every instance in which the necessities of this country might require the introduction of *Russian* produce into the ports of *England*, the enemy would derive a concurrent advantage by the transfer and circulation of his own commodities. I am under the necessity of considering the vessel, therefore, as captured on a voyage which by no latitude of interpretation can be brought within the terms of the licence by which alone it could be protected, and the plea, that the cargo was taken on board by compulsion, being in its own nature inadmissible, the cargo cannot be exempted from the fate of the ship.

CARL, BERLIN.

Jan. 29th,
1810.

THIS was the case of a vessel in ballast, which was captured on a voyage from *Louisa* to *Cronstadt*. A claim was given by a *British* house of trade, setting forth, that in the month of *August* 1808, and also in the months of *February* and *May* 1809, they had procured licences to protect various ships engaged in importing cargoes from *Russia* to this country; that the licences were forwarded, soon after they were procured, to their agent at *Petersburg*; but that, owing to the difficulty of procuring vessels in the *Russian* ports, some of the licences obtained in *August* 1808 remained at the end of the season in the hands of their agent, and among others the licence on board this vessel; that in *May* or *June* 1809 they were informed by their agent, that he had engaged the ship *Carl*, then in the port of *Louisa*, to proceed from thence in ballast to *Cronstadt*, to take on board a cargo which he had purchased for their house, for the purpose of proceeding with it to a *British* port; that they were subsequently informed by their agent, that not having then received any of the licences procured by them in *February* and *May* 1809, he had, in order to save the season, sent to *Louisa* one of the licences procured in *August* 1808, with a view to protect the ship from capture on her way from *Louisa* to *Cronstadt*. The claim further set forth, that it was the fixed intention of the *British* merchants, and also of their agent, that one of the licences, procured in *February* and *May* 1809 (copies of which were annexed to the claim) and which had actually been

Vessel proceeding to the port of shipment in ballast, the licence having expired, but with an endorsement, setting forth that a new licence had been obtained, and would be applied to this vessel on her arrival at the port of shipment—restitution.

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been forwarded previous to the capture, should be used to protect the ship *Carl* on her voyage from *Cronstadt* to *England*; but which of the licences would have been so appropriated they could not set forth, as it must have depended on the time of their coming to hand.

JUDGMENT.

Sir *William Scott*.—In any view of the case there can be no doubt that the captors were fully justified in detaining this vessel, as the licence found on board had expired several months before this transaction took place. The licence permits a vessel under any flag, except the *French*, to bring a cargo to this country from any port in the *Baltic*; and there is an endorsement on the back of it in these words: “The annexed licence
“ came to the hands of the undersigned, a *British*
“ subject, now in this country upon commercial
“ business, too late in the season to make the intended
“ use of it; but having bought the *Louisa*-built ship
“ *Carl*, which I have ordered here to take in a cargo
“ of *Russian* produce for *England*, I have provided
“ her with the documents for a free passage in ballast
“ from *Louisa* to *Cronstadt*, not doubting to provide
“ her with a new licence for *England*, having advice
“ of such documents taken out and obtained by my
“ friends. I trust, therefore, under these circum-
“ stances, a free passage, and even protection, will be
“ given, by all *British* or allied cruisers to the said
“ ship.” Dated *St. Petersburg*, 10 (22 May) 1809. Such a statement the captors were justified in disregarding; for certainly this Court, in considering the application and use of these licences, has never laid it down that *time* is an ingredient of no consequence.

And

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And here I cannot help expressing my surprise, that the licences taken out for this particular trade are limited to the period of six months, as well on account of the length of the voyage, as the known fact that the ports of *Russia* are very ill supplied with shipping, a difficulty which is frequently to be removed by obtaining vessels from other ports in the *Baltic*. These considerations do, in my apprehension, form a ground for this Court to exercise an equitable discretion in distinguishing this class of cases from some others which have been alluded to in the argument. For this Court will consider it a part of its duty to attend to the local circumstances and situations of the different countries in which these licences are to be carried into effect. Where there is evidently no fraud in the transaction, the Court will, in considering this class of cases, hold the rule less strictly than it would do relatively to transactions taking place in countries where the opportunities of carrying adventures into effect are more obvious. Now, in the present case, I ask, whether there is any thing like an indication of a fraudulent intention; it is surely one symptom of fairness, that the agent shipper puts on board this acknowledgement of the infirmity of the licence, and refers to one subsequently to be obtained in *England* for protection. I certainly see something of negligence in the house here, in not making immediate application at the Council Office for a licence expressly for this particular ship, the moment it was known to them that she was to be sent to *Cronstadt* with this expired licence on board.

But looking to the importance of this commerce, and the difficulty of maintaining it under the deficient supply of navigation in the ports of *Russia*, if I were to fasten down upon the parties penal consequences for

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for every trifling irregularity, it would be to put this important branch of the commerce of the country into a state of thralldom that must amount to an utter extinction of it. Under these considerations I think I am not stepping beyond the equitable discretion which this Court is bound to exercise, in saying, that these licences convey a virtual protection to this vessel; and I shall therefore restore, on payment of the captor's expences.

Feb. 20th,
1810.

EUROPA, SCHMIDT.

Licence to proceed to this country—deviation to the River Yadhe—condemnation.

THIS was the case of a vessel under *Bremen* colours, which was captured in the river *Yadhe*, on a voyage from *Archangel*, with an asserted destination to *Leith* for orders. In his answer to the seventh interrogatory, the master stated that he had been under the necessity of putting into the *Yadhe*, in consequence of the ship having struck upon a sand, and lost an anchor and cable; and that the voyage was to have ended at some port in *England*, which he was to be informed of at *Leith*, where he was to have called for orders respecting the port he was to proceed to for the purpose of delivering his cargo.

JUDGMENT.

Sir *W. Scott*.—This ship, which had sailed from a *Russian* port, with a professed destination to *London*, was captured in the river *Yadhe*. The excuse set up is, that the vessel had sustained damage, and was in want of repair; but this certainly is an excuse, which, if it were to rest only on the averment of the master, could not safely be relied on. Supposing it

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It to be true that the original destination to this country has been altered in consequence of a *vis major*, it is impossible to consider the fact as sufficiently established by the mere averment of the persons on board. For although the demand of further evidence may press hard in particular instances, the situation in which this Court would be placed in receiving such excuses in other cases, from the very persons who, if there be any fraud in the case, are the parties to that fraud, renders the precaution indispensable. The master of this vessel says, that on his arrival at *Leith* he was to write to a respectable merchant of this town for further orders; and if this statement is correct, that gentleman is probably in possession of correspondence which will afford the claimant an opportunity of proving his case by evidence not coming solely from the master himself. The master says, that "he intended to look for convoy off the coast of *Norway*, and not succeeding, edged off for *Heligoland*; but before reaching that place a gale of wind came on which forced the vessel towards the *Tadhe*, and being thick weather she struck upon a sand, and afterwards came to an anchor, but her cable parting she steered for the *Tadhe*, in order to go to *Eckwarden* to repair the damage she had sustained, and to get an anchor and cable." All the witnesses state that there had been a gale of wind; but I have to regret that there is no information before the Court respecting the actual state of the vessel, and I shall, therefore, allow further proof of the destination to this country from such evidence as the *British* merchant, vouched by the master, may be able to supply; and also a commission of inspection to ascertain the condition of the ship.

Ultimately condemned, upon failure of evidence of a destination to this country.

Feb. 16th,
1810.

SPECULATION, EBERHARD.

JUDGMENT.

Licence on board, but not intended to be applied to this vessel — no ulterior destination to this country — intention to sell the ship in the enemy's port — condemnation.

SIR *W. Scott*.— This ship, under *Lubec* colours, was captured on a voyage from *Copenhagen* to *Riga*, in ballast, with a licence on board, which does not appear to refer in any manner to this vessel as it is not indorsed, and the name of the ship is not to be found in the body of the licence. The Court is extremely unwilling to be rigorous in respect to the application of licences to the vessels which they are intended to protect. But they must, in some specific manner, be so applied; and I cannot take the mere averment of the fact by the *British* claimant to be sufficient. In this case a licence was found on board at the time of capture, and *prima facie* it might be taken as intended to be applied to this vessel: but the fact may be otherwise. For instance, the licence may be going for the protection of some other vessel, to which it is to be applied, and it would be impossible to say, that the mere circumstance of its being on board the vessel that conveys it shall be sufficient for her protection also.

There is nothing in the present case to shew that this licence was intended by any of the parties to be applied to this vessel. All that appears is, that the owner of the ship at *Hamburg* is sending this licence to his correspondent at *Riga*, telling him that he would send instructions for its application; and directing him to let this ship on freight, or in failure of that, to put her up to sale. His words are these: “ I hereby take the liberty of enclosing you a
“ licence at your disposal, having to-day an opportunity for sending you the present. I hope it will
“ soon reach you, and I will write further to you on
“ this subject by post.” And in another letter on board, addressed to the same person, he says, “ The
“ bearer

“ bearer hereof is Captain *Eberhard*, commanding
 “ the ship *Speculation* ; have the goodness to procure
 “ him as good a freight as possible, in order that this
 “ undertaking may render me a good profit. If I
 “ could get 9,500 or 10,000 R. D. *Hamburgh* banco
 “ nett for the ship, I should be inclined to sell her
 “ again, for which purpose I hereby empower you to
 “ do so.” Here, then, are very slender grounds whereon
 to infer that this licence would have been applied to
 this vessel by the correspondent of the owner at *Riga*.
 But if we had got that length would that be sufficient?
 I am of opinion that it would not. Licences are
 granted by the Government of this country on a pro-
 spect of reciprocal advantage to the government
 which grants it, and the foreigner who receives it.
 The permission of going from one port of the
 enemy to another requires that the vessel shall
 be going thither for the purposes of *British* trade.
 Now it cannot be argued that such was the intention
 of the parties in the present case, because no such
 voyage was in contemplation, for, on failure of ob-
 taining a freight, there was the alternative purpose of
 selling the ship at *Riga*. There must, in all these
 cases, be an intention conformable to the objects for
 which the licence has been granted. Parties are not
 to take advantage of the permission to proceed to the
 port of the enemy, without an engagement that the
 vessel is proceeding thither for the purposes of a trade
 immediately connected with this country ; for surely
 licences cannot be presumed to be granted for the pur-
 pose of carrying on the enemy’s trade, without any
 ulterior view to *British* use and advantage. Here,
 therefore, is a total failure not only in the application
 of the licence to this particular vessel, but also in its
 effect, supposing it had been so applied to a vessel
 proceed-

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CASES DETERMINED IN THE

... to the port of the enemy for sale. Then
... whether, throwing the licence out
... the vessel would be subject to condemna-
... that being a prize vessel, pur-
... the enemy, she is entitled to
... of a neutral vessel, and at liberty to
... from one enemy's port to another.
... the only circumstance in the case, it might
... be remembered that this vessel was
... in a blockaded port, where
... is allowed in ships more than in
... and consequently the transfer is illegal. In the
... this vessel was proceeding to *Riga* to be
... that this would be in itself a trad-
... of the Order 7th *January*, and
... would be liable to confiscation.

JULIENNE MARIANNE, DEBOER.

... under *Prussian* colours
... from *Bordeaux*
... under a licence per-
... and other *Brit-*
... of enumerated goods
... and then to
... The words, "to
... belong," not
... the question was, whe-
... which belonged to
... under it.

...
... The question in this case is, whether
... the *British* con-
...
...

signee at the time of capture, for this Court has never yet restored the property of the enemy, except in those instances where the words, "to whomsoever the property may appear to belong," are introduced into the licence. Where those words occur they have been held to exclude all enquiry into the proprietary interest; —but they are not to be found in the licence on board this vessel, and the Court, therefore, is not at liberty to depart from the general rule.

It is a settled principle in this Court that in order to constitute an effectual transfer of the property there must be either an order for the goods, or an acceptance of them by the consignee, prior to the capture. If the capture takes place, where no order has been given, and before the goods have been accepted, they must be considered as the property of the persons who have so consigned them. In this case, therefore, the Court has called for evidence to shew, whether any order had been given by the *British* merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the claimants, that any specific order was given for these goods, but an affidavit is now introduced purporting that the manufacturers at *Valenciennes* knew the quality of the goods wanted by the house here, and that it was understood they were to make their shipments, without waiting for orders. I certainly cannot conceive that any such understanding could impose upon the parties here an obligation to accept goods to any quantity, as well as of the specific quality; but what makes this account the more unsatisfactory is, that the shipment is not made by the manufacturers at *Valenciennes*, but by a house at *Paris*; and how are the parties here to be bound by *their* act? The course of trade referred to in this affidavit does not apply to the house at

The
COUSINE
MARIE NNE.

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1810.

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COUSINE
MARIANNE.

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Paris, but to the manufacturers at *Valenciennes*. If, however, the shipment had been made by the manufacturers themselves, the question would still remain for the consideration of the Court, whether a general order to ship goods of a certain quality would impose upon the parties a legal obligation to accept goods of that description to any quantity. In order to shew that the parties here have a vested interest in the property, it must be shewn that they were under a legal obligation to accept these goods on their arrival. Now I have no idea that these shippers, putting their character as alien enemies out of the question, could have compelled the *British* merchants to a specific payment for these goods. There might exist an expectation on their part that they would be accepted and paid for; but there was no legal obligation on the *British* merchants, and therefore unless it had been shewn that there was some act done by them in the nature of an acceptance of the goods prior to the capture I cannot but be of opinion that the legal property still remains in the enemy, and consequently, that this portion of the cargo must be condemned, as not being protected under the words of this licence.

VROW CORNELIA, DYKSTRA.

March 14th,
1810.

THIS was a question on the effect of an attested copy of the original licence under which the brandies on board this vessel were to have been imported into *Hull*, from *Charente*; the vessel having sailed from *Bordeaux*. There was a further question, whether the licence being for a cargo of brandy, and the original having been used for 289 puncheons, which were shortly after forwarded from *Charente* to *Hull*, in the *Johannes Von Letten*, this copy of the licence could enure to the protection of the goods on board this ship, being the other part of the original cargo intended to have been brought in one vessel from *Charente* when the licence was obtained. The claimants shewed that the cargo was purchased on their account, and ready to be shipped when the licence was applied for, but that they were unable to make the shipment at *Charente*, as the foreign vessels in that port were under sequestration, and the *Goede Verwagting*, which was chartered for the purpose, had been prevented by the *French* decrees from going thither. That under these circumstances they sent on this portion of the cargo over-land to *Bordeaux*, where it was shipped in the *Vrow Cornelia*, and the sequestration being in a few days after taken off from the *Johannes Von Letten*, then at *Charente*, they availed themselves of the opportunity to ship the remainder direct from that port.

Licence to bring a cargo in one vessel—sufficient to protect the same cargo shipped on board two vessels, one of them having only an attested copy on board, and having taken in her portion of the cargo in another port.

The
VROW
CORNELIA.

March 14th,
1810.

JUDGMENT.

Sir *W. Scott*.—In the use and application of licences, the Court will not limit the parties to a literal construction. It is sufficient that they shew under the difficulties of commerce that they come as near as they can to the terms of the licence; and where that is done, the Court will not prevent them from having the entire benefit intended by His Majesty's Government. If I did not adopt this rule, I should inflict a severe wound upon *British* commerce, than which nothing can be farther from my inclination; and if the cruizers expect a more rigid construction of licences from me, they will find themselves disappointed. Wherever I am satisfied that there is no bad faith in the parties, and no undue extension of the terms of a licence beyond the meaning of the Council Board, any little informalities, or any trifling deviations, shall not injure them.

It appears that in the present instance the licence was granted to import these brandies into this country from *Charente*; but, for the reasons stated in the affidavits, it is shewn that there was an impossibility of bringing out the cargo from that port, and consequently this portion of it was very warrantably forwarded from *Bordeaux*, to be exported from thence; for it is known that in the present state of *France*, a merchant is often unable to tell from what port he can ship his cargo,

It was put upon the parties to prove that the goods ordered from *Charente* are the same goods that were put on board this vessel at *Bordeaux*; and it is said that there is reason to suspect that this is not the case, as the charge of warehouse rent is not in the invoices. I should have been
startled

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VROW
CORNELIA.

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startled if it had. It is not usual to introduce such a charge there, and I do not see what motive there could be to attempt an imposition on the Court in this part of the case. The only question, therefore, to which it is necessary for me to direct my attention is, whether there has been any fraud upon the Government, in the application of the licence or in the use of it.

Mr. *Corlafs* and his partner, in *Yorkshire*, are great dealers, and there are other dealers concerned in this transaction, but not to the same extent. These, through *Corlafs*, order a particular quantity of brandy, and he says he has usually half the quantity in the ship, and this assertion I have no reason to question; they make application for a licence for this conjoined cargo, of which *Corlafs* has the superintendance, he having what is equal to all the rest, and the formal business is done through *Hodgson*, whom I suppose to be a broker. Application is thus made to the Council Board, and they obtained a licence for the cargo to be imported into this country in the *Goede Verwagting*, or any neutral vessel. What is the fair construction of this licence? Certainly, that they might import a cargo sufficient in bulk, to stow the *Goede Verwagting* full, or any other neutral merchant ship. If they, under cover of this licence, had imported in two vessels what no one mercantile vessel in the port of *Charente* could hold, it might be considered as a fraud; but the whole quantity, it has been shewn, is not beyond the capacity of vessels frequently sailing from that port. Upon the faith of this licence thus obtained, orders were given by *Corlafs* to his agents in *France*, for a particular quantity of brandies for others and for himself, sufficient

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VROW
CORNELIA.

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1819.

ficient to fill up the measure of the vessel, and under such a licence he had a right to have what would fill up any such a vessel as the *Goede Verwagting*.

It appears that the *Goede Verwagting*, under the present difficulties of commerce, could not get admission at *Charente*, in consequence of which delay the licence expired. In this distress, the parties apply for a new licence to import the brandies in another ship; not for a ship of any particular dimensions, for they must be content with what they could get, and they send a ship which, having only a copy of the licence, could not proceed to the place of destination. It then became necessary to adopt other means; and what do they do? They take the *Johannes Von Letten*, and in that they put a cargo consisting of a portion of these goods, under the protection of the licence itself, and they provide a certificate that the *Vrow Cornelia* put to sea from *Bordeaux*, having on board a copy of this licence, with 300 puncheons, another portion of the intended cargo, and so forth. Thus documented these vessels openly avow that *two* are to be sent; and thus the parties establish their good faith and integrity by the most ingenuous disclosure of the whole transaction.

The application to the Council Board was for permission to bring a cargo, and if a proper ship could not be got, which is a matter likely to occur under the present difficulties of commerce, it is fit that they should be at liberty to put that cargo on board two ships; to say that this is a fraudulent use of a licence is not correct. The *quantity* the Government looked to; *that* is the matter to be considered; and if the quantity in two ships be only equal to what might have

have come and was intended to have come in one, where is the fraud? If you do not prove that the quantity has exceeded the intention of the grantor, you prove nothing. Under these circumstances, I think the parties are perfectly entitled to the restitution of the property, as I do not see any objection to the propriety of their conduct.

The
VROW
CORNELIA.

March 14th,
1810.

March 30th,
1810.

JOHAN PIETER, SCHWARTZ.

Licence expired
in consequence
of embargo in
enemy's port—
no proof of the
identity of the
transaction
held to be a sub-
sisting licence,
after government
had ceased to
grant such.

THIS ship was captured on a voyage from *Charente* to *Newcastle* with a cargo of brandies, having sailed from *Charente* on the 23d *Feb.* 1810. Claims were given in by *British* merchants for the ship and cargo, as protected by a licence on board the vessel, bearing date 27th *April* 1808. In the claim for the cargo it was stated that the ship had been chartered by the *British* claimants, and sent out in *April* 1808, for the purpose of bringing away a cargo of brandy on their account from *Charente*, where she arrived in the month of *June* following, but was immediately placed under an embargo, by which she was detained till *Feb.* 1810, and the cargo which had been ordered by them, and was at the time of her arrival ready to be put on board, was continued in warehouses until *Feb.* 1810, when it was permitted to be laden.

On behalf of the Captors—it was contended, that the licence having expired it could not be held to protect the voyage, unless it could be shewn that this was the identical transaction in contemplation when the licence was obtained, and that its progress had been interrupted by obstacles not within the control of the parties themselves—That the goods were not even put on board till a very long period after the expiration of the licence, and in that respect the case differed from those which had hitherto presented themselves to the notice of the Court.

JUDG.

JUDGMENT.

Sir *W. Scott*.—The leading principle which the Court has laid down for itself, in considering these cases of licences, is this, that where there appears to have been no fraud, either actual or meditated, the Court will strain every nerve to relieve the parties from those difficulties to which they are subjected by the caprice and violence of the enemy, and the unprecedented state of all commercial transactions. In doing this it is content to take the question upon the evidence arising from the case itself, without calling upon the parties to disclose the whole course of their commercial correspondence with the enemy. Where the Court is satisfied of the identity of the transaction, and that all fair diligence has been used in order to its completion within the time prescribed, it will look no further. It will not call upon the parties for the production of unnecessary and oppressive proof. If the embargo is shewn to have existed, it will not call upon them to explain from what motives the government of *France* has from time to time varied its policy with regard to the small portion of foreign commerce that it retains.

In the present case, I think, there is as much evidence to found a presumption of fairness, as the Court is in the habit of requiring in ordinary cases. It is unnecessary for me to go through all the evidence from which I draw this conclusion; and I shall content myself with expressing my perfect conviction that these are the identical goods intended to be brought to this country at the time when the licence was obtained, and that the integrity of the transaction cannot be impeached.

I have only, therefore, to determine, whether it is in the power of the Court to consider this as a subsisting licence,

The
JOHAN
PIETER.

March 30th,
1810.

The
JONGE
FREDERICK.

May 10th,
1810.

but *redeundo*, where the original purpose has been defeated by the elements or the act of the enemy. At the same time, in order to entitle himself to this benefit, it is absolutely necessary that the claimant should shew, that these are the identical goods that were carried out, and that no others were taken on board in the enemy's port. But as there is no particular reason for any suspicion of fraud in this case, the Court will content itself with an affirmance on oath that no other goods were taken on board the vessel.

Restored.

March 15th,
1810.

EUROPA, SUNDBERG.

Naval stores—
condition of
licence to touch
at *Leith* for con-
voy, not com-
plied with—li-
cence invalidated
—but the naval
stores protected
on other grounds
—the remaining
part of cargo
condemned.

THIS was the case of a vessel under *Dantzic* colours, which was captured on a voyage from *Riga* to *London* with a cargo of hemp and iron. The ship and cargo were claimed as protected under a licence, and it was argued on the part of the captors, that the vessel having been captured to the westward of the *Tekel*, she had violated an important condition of the licence, by which it was provided, that if any part of the import cargo should consist of naval stores, and be destined to any port south of *Hull*, the vessel should proceed to *Leith* or *Dundee*, for convoy, and consequently, that requisition not being complied with, the parties could not claim protection for their property under the licence.

For the Claimants it was contended—That a licence for the hemp was unnecessary, as it was fully protected by

by the Order in Council of the 4th *February* 1807, and that the licence applied only to the iron, which did not come within the description of naval stores.

The
EUROPA.

March 15th
1810.

JUDGMENT.

Sir *William Scott*.—I am perfectly clear, that if this case stood upon the licence alone, the ship and cargo must be condemned, as there has been a violation of a fundamental condition of the licence, without which it cannot have effect, unless it were shewn, that from stress of weather, or some other insurmountable obstacle the condition could not be complied with. Where that, indeed, is the case; the Court would take upon itself to do that which it must presume the Government would have done under the known rule of law; that no persons can be bound to impossibilities. No impossibility is suggested in the present case; but I think there is a good deal in the argument, that the Order of 4th *February* 1807 is sufficient for the protection of the hemp; and consequently of the vehicle that conveys it, as that Order permits the importation of hemp and other enumerated articles, in neutral vessels, from any port not under blockade. I can by no means accede to the position, that because the parties had recourse to the protection of a licence, therefore the Order in Council is superseded. Suppose they had overlooked the Order in Council, it is not the less imperative upon the Court, and I cannot overlook it. The hemp, therefore, must be restored; but as a substantive condition of the licence has been violated, it is vitiated *in toto*, and cannot enure to the protection of the other part of the cargo, which is not within the Order in Council, and therefore I shall condemn the iron.

May 17th,
1810.

CORNELIA, ROOSE.

JUDGMENT.

Licence to bring
a cargo to this
country sufficient
to protect the
voyage in ballast
to the port of
shipment.

SIR William Scott.—This is the case of a *Prussian* vessel which was captured on a voyage from *Boulogne* to *Varel* in ballast, and asserted to be going thither for the purpose of bringing a cargo to this country, under a licence permitting a vessel bearing any flag, except the *French*, to proceed with a cargo of enumerated articles to any port of this kingdom north of *Dover*. The question for my determination is, whether or not this permission is to be considered as a sufficient protection for the vessel on her way to the port of lading in ballast, this licence being expressed in terms which look only to the voyage from the port of lading to this country, as it does not contain the usual clause, permitting the vessel to proceed to the port of lading in ballast. I confess that I should be inclined to hold that it is a sufficient protection under such circumstances; but it would only be indirectly, and by an extension of the terms of the licence, that the ship could be so protected, and therefore I must have the clearest proof that she was actually proceeding to the port of *Varel*, for the express purpose specified in the licence.

Subsequently condemned on failure of proof of the intention of proceeding to *Varel* for the purpose of bringing a cargo to this country.

SARAH MARIA, MARSTRAND.

May 30th,
1810.

JUDGMENT.

SIR William Scott.—This is the case of a vessel laden with wheat, and bound on a voyage from *Marennnes* to *London*, and claimed as protected under His Majesty's licence, which expired on the 28th *January* 1810, the vessel not having cleared out from the *French* port until the 24th *March*. Corn licence—
time extended.

I must here take the opportunity of observing, that it is not merely from a tendernefs for the hardships to which *British* merchants are exposed, but from a due attention to the policy of the Government, under the known fact of an existing scarcity of grain in this country, that the Court is disposed to give the utmost effect to these corn licences, and to expect, that on the part of the captors no unnecessary difficulties will be thrown in the way of restitution, when the most satisfactory information has been offered them by the merchants of this country. The Court has, in other instances, extended the time for licences, on account of impediments arising in the ports of the enemy; and His Majesty's Government has in these cases felt the same necessity. Successive Orders in Council have extended the periods for the expiration of licences for the importation of grain, where impediments have arisen to prevent their being carried into effect sooner. This is a fact of which the captors can hardly have been ignorant. Nor can I construe the intention of His Majesty's Government so narrowly as to suppose, as has
B B 2
been

The
SARAH MARIA.

May 30th,
1810.

been suggested, that the impediments in the contemplation of the Government were solely those attending the clearing out of the vessels from the enemy's ports. The indulgence must embrace also the difficulty of procuring ships for the purpose, and all other insurmountable impediments, of whatever description. In the present case the cause of the delay has been explained; but as this licence is out of date, it is suggested that it may have been used before, and it has been urged against the claimants, that they have not negatived that imputation. I shall certainly not require that to be done; where there is nothing to raise a suspicion of such an abuse of the indulgence, I will not lay such an *onus* upon the *British* merchant. This is the first case in which I have had an opportunity of delivering my sentiments on this subject, and I wish them to be attended to by captors. As it is the first case of this class, I shall give the captors their expenses; but I wish it to be understood, that I will not do it in any future case arising under the same circumstances.

HENRIETTA, TORBIORNSSEN.

July 31st,
1810.

THIS was the case of a *Danish* vessel, proceeding with a cargo of *Rye* from *Fannoe* to *Leith*, under a licence allowing her to import permitted articles into any port of this country north of *Dover*, but ultimately with the intention of going on to *North Bergen* with her cargo, after paying the tonnage duties at *Leith*, and obtaining permission to go there if it could be had.

Licence to import into this country—sufficient for the voyage to a *British* port, with an ulterior destination to a port of the enemy after paying tonnage duties.

JUDGMENT.

Sir *William Scott*.—I am inclined to think that this is a fair case on the part of the master, and that it would be narrowing the construction too much to say, that a destination to *Leith* to pay tonnage duties is not a good execution of the licence. The licence authorizes the importation of a cargo into *Leith* from the port of the enemy, and the master says he intended to go on to *Bergen* after payment of the duties at the *British* port; but this intention must be understood with reference to the authority and permission of the Government of this country subsequently to be obtained. I do not see how that ulterior purpose can vitiate the licence for the voyage to *Leith*; it is but fair to suppose, that on the arrival of the vessel there, application would have been made to Government for a fresh licence to proceed to *Bergen*. It might not be possible for the parties in a foreign port to obtain the exact kind of licence that would authorize the continuous voyage to *Bergen*, and therefore they divide the voyage, and proceed first to a *British* port, avowing

The
HENRIETTA.

July 31st,
1812.

the purpose of going on to *Norway* at the bottom of the licence. Had the vessel been captured on the ulterior branch of the voyage, with only this licence on board, the case would have been different; but she is actually proceeding to the port of *Leith* at the time of capture, and under a sufficient protection for that branch of the voyage. I shall, therefore, restore, allowing the captors their expences.

August 1st,
1812.

NICOLINE, NIELSON.

JUDGMENT.

Licence to carry
corn from *Den-*
mark to *Norway*
—Military stores
concealed—
Condemnation.

SIR *William Scott*.—The question in this case is, Whether this ship is entitled to protection from the licence on board? for if not, as *Danish* property, the vessel will be subject to condemnation. No principle, applicable to questions of this nature, is better founded in reason and justice than that all persons trading under the protection of licences, are bound to act with the purest good faith, and the obligation is in no degree diminished where the privilege is granted to an enemy. Now, what is the case here? The vessel is permitted, by the licence on board, to proceed with a cargo of corn only, from *Denmark* to *Norway*, first touching at *Leith* to pay tonnage duties; but it turns out that a quantity of fire-arms of different descriptions have been found stowed away under the cargo. It is impossible to suppose, that by granting a licence to carry corn, it was ever intended by His Majesty's Government to permit the transport of articles of this noxious description from *Denmark* to the ports of *Norway*, which are crowded with priva-
teers.

teers. I have no doubt that this breach of good faith amounts to a total defeasance of the licence, and consequently that the ship and cargo must be condemned.

The
NICOLINE.

August 1st,
1810.

WOLFARTH, HARTING.

August 1st,
1810.

THIS was the case of a *Prussian* vessel, which was captured on a voyage from *Stettin* to *St. Peterburg*, for the purpose of bringing a cargo of tallow and hemp to this country from the latter port, under a licence which was on board the vessel at the time of the capture, and which enabled her to go there only in ballast. The master had a quantity of beech wood on board, which, in his deposition, he described as ballast, but the cabin-boy, in his evidence, stated it to be half a cargo,

Licence to go to
the enemy's port
in ballast—Cargo
on board—Con-
demnation.

JUDGMENT.

Sir *William Scott*.—This is conduct which it becomes this Court to watch with the utmost jealousy. If the condition of the licence is such, that the vessel is to proceed to the enemy's port in ballast, it is obvious that she cannot be permitted to carry thither any thing that comes fairly within the description of cargo. Here is a certificate of origin on board, which in itself is sufficient to give that character to the commodities on board, and to say, that indulgence is to be shewn in this case merely because the amount of the cargo is only equal to half the tonnage of the ship, is to say, that the Orders in Council shall be carried into effect to the extent of a moiety only.

Ship and cargo condemned.

August 1st,
1810.

EMMA, MALLGREN.

JUDGMENT.

Touching for
orders at inter-
dicted port, not
known to be such
at the time of
sailing—Restitu-
tion.

SIR *W. Scott*.—This is the case of a vessel which was captured on a voyage from *Riga* to *Gottenburg* for orders, and I am certainly by no means disposed to relax the rule prohibiting vessels with licences to this country from going into any interdicted port for orders. When the capture took place, the ports of *Sweden* had become interdicted ports to this vessel, under the order 7th *January*; but it does not appear, that at the time when the vessel sailed, the parties at *Riga* had any knowledge of the exclusion of the *British* flag from the ports of *Sweden*; that exclusion did not take place till the 24th of *April*, and this vessel sailed from *Riga* on the 24th of *May*. There was, indeed, something of a rumour prevalent at *Riga* at the time that such was the state of things in *Sweden*, but not in such a shape as would necessarily induce an actual belief of it; and I shall, therefore, permit evidence to be brought in for the purpose of shewing whether the fact was publicly known at *Riga* when the ship sailed.

Ultimately restored, as it was not shewn that the fact of the exclusion of the *British* flag from the ports of *Sweden* was known at *Riga* when the ship sailed.

FRAU MAGDALENA, HANSEN.

Oct. 24th,
1811.

JUDGMENT.

SIR *William Scott*.—This was the case of a *Danish* vessel captured on a voyage from *St. Petersburg* to *London*, under a licence, but with directions to touch at *Neustadt* for orders. A claim has been given for the ship as coming to *London*, and for part of the cargo only as consigned to a house of credit in this town. In support of this assertion, a letter of advice is referred to, by which the *British* claimants say, that they were empowered to dispose of this portion of the cargo, and that they believe the voyage was to end in a port of this country. But that is matter of belief only. In point of fact they know nothing of the transaction, but from the letter on board, which is not sufficient ; for it can be matter of no great difficulty for the foreign shippers to write a letter to that effect to their correspondents here, and to countermand it afterwards, if they should be able to dispose of their cargo elsewhere. It is said, that all the evidence in the case supports the averment of an actual destination to *London*. That is not so ; the master was to call at *Neustadt* for orders, which might have been of a contrary tenor, directing him to deliver his cargo in that port.

Touching at interdicted port for orders—Licence violated—Condemnation.

It has been repeatedly decided, in cases of blockade, and this class of cases must be decided by analogy to the rules of blockade, that a vessel cannot be permitted to touch at an interdicted port for orders, under a licence for a direct voyage to this country.

This

The
FRAU
MAGDALENA.

Oct. 24th,
1811,

This is a rule which the Court has felt it necessary rigidly to adhere to, except in those cases where the vessel had quitted the intermediate port with the identical cargo she had carried in, and was actually proceeding for *England* at the time of capture. In those cases the presumption that there was an intention of delivering at the intermediate port was repelled by the fact, that the ship had come out again with the same cargo, and the Court therefore relaxed the rule. The rule is founded not only upon the presumption, that at the intermediate port the vessel might receive another destination; but that she might actually deliver her cargo in that very port. The Court cannot enquire, nor has it the means of ascertaining whether there was any *mala fides* in the contemplation of the parties; it can merely look to the fact whether the vessel was going to an interdicted port or not, and if so, the presumption of law must be, that she was going thither for the purpose of violating the licence. The fact may, in some cases, be otherwise, and the rule may at times operate with severity upon innocent persons; but it is a sacrifice which must be made to the general security.

In the present instance the parties may, for any thing that appears, have *intended* to act honestly, but they are doing that which in express terms the law of this country prohibits, and I must therefore hold this ship and cargo subject to condemnation.

HOPPET, HALBERG.

Nov. 1st,
1811.

JUDGMENT.

SIR *William Scott*.—This vessel was proceeding, at the time of capture, on a voyage from *St. Petersburg* to *London*, under a licence permitting her to come to this country after touching at a *Swedish* port for orders; and it is the first licence of the kind that has come before the Court. The general principle maintained by this Court has been, that a vessel proceeding under licence from an interdicted port to a port of this country, is not at liberty to touch at another interdicted port for orders. But for reasons which have approved themselves undoubtedly to the Government of this country, licences have been granted, containing the express permission to call at *Swedish* ports for instruction. It is the clear duty of this Court to uphold the intention of His Majesty's Government, by granting to the claimants immediate restitution; and as the voyage has been defeated by the seizure, I shall not allow the captor his expences, who with this licence staring him in the face, had certainly no right to interrupt this course of the transaction.

Touching at
interdicted port
for orders—
Licence expressly
permitting it—
Restitution.

BOURSE, *alias* GUTE ERWAGTUNG.

JUDGMENT.

Licence to sail
under any flag
except the
French, held to
exclude *French*
ownership—
Condemnation.

SIR *William Scott*.—This is the case of a vessel navigating under *Prussian* colours, but in reality belonging to *French* owners. The ship was captured on a voyage from *Bordeaux* to *London*, under a licence permitting her to sail *under any flag except the French*; and the question is, Whether the ship is entitled to protection? The cargo, which belongs to other parties and is not involved in the question, has been restored by consent. It has always appeared to me, that the exception of the *French* flag only is not very clear and intelligible; but if I am called upon to construe it, I am inclined to hold, that a vessel being *French* property was intended to be excluded from the benefit of the licence, although not accompanied with the formal characteristic of the *French* flag. Wherever, therefore, these words “bearing any flag except the *French*,” have presented themselves to the notice of the Court, It has felt the necessity of giving them a more substantive meaning, as excluding *French* interests, and has held, that where *French* interests clearly appear, the vessel cannot be protected by the mere absence of the *French* flag. If otherwise, the whole *French* navigation might be conducted with the utmost safety, nothing else being requisite but that a foreign flag should be substituted for the *French*. It does not appear to me, that it could be the intention of the State to give that accommodation to the public enemy. If I am wrong in this supposition, the error must be corrected by superior authority. In the present case the vessel is navigating under the *Prussian* flag, but the property is proved to be *French*, and I shall therefore condemn the ship.

JONGE CLARA, STEVENS.

August 7th,
1811.

JUDGMENT.

SIR William Scott.—This is the case of a vessel taken on a voyage from *Bordeaux* to *London*, with a cargo of wine, seeds, cream of tartar, verdigrease, capers, and other goods. A claim is given in for the ship and cargo, as protected under the licence on board, permitting this vessel, under any flag except the *French*, to export from *London* and *Poole*, to any port in *France* between *L'Orient* and the river *Garonne*, any articles which by law might be exported, except cotton wool, and to import in return a cargo of grain, meal, flour, burr-stones, seeds, *French* cambricks, lawns, olive oil, and wine; upon condition that the vessel importing the wine, should have exported to *France* under the same licence, *British* or *East India* manufactured goods, sugar and coffee, and that the cargo so to be imported, should consist of two-thirds in bulk of grain, meal, flour, and seeds, and in no case of more than one-third in bulk of wine. The ship is the property of a person at *Emden*, and it is contended by the captors, that in consequence of the annexation of that place to *France*, this vessel is now liable to be considered as the property of a *French* subject. But I observe that the ship is described by name in the licence which was granted for its protection while engaged in *British* commerce, and it can hardly be contended, that a sudden and unexpected change in the political relations of the country to which she belonged should deprive her of that protection if the parties have acted fairly under it. It is a known fact, that many vessels belonging to countries annexed to

License to sail under any flag except the *French*, held to protect the property of persons in countries unexpectedly annexed to *France* while engaged in *British* commerce—Construction of the terms of the licence as to the quality of the cargo—Non-enumerated articles condemned without freight.

The
JONGE CLARA.

August 7th,
1811.

to *France* have obtained licences, and that no alteration was made in that respect until *February* of the present year.

But it has been further urged on the part of the captors, that this licence has been violated in many respects; that the quality of the outward and return cargoes were not such as are permitted by the licence, and that it had expired before it was made use of. It is said, that by this licence the parties were bound to carry out *British* or *East India* manufactured goods, sugar or coffee, to the amount at least of one-third of the tonnage; and that in point of fact, the outward cargo consisted of salted cod-fish and herrings. In my apprehension, these goods are sufficiently within the spirit and meaning of the licence; they are not in a state of nature; they were cured in this country; they are articles which have received the aid of *British* industry, and in which the commerce of the country is deeply interested. Indeed, if any doubt could arise upon the subject, the custom-house clearance, where the nature of the articles composing the outward cargo must have been fully understood, would put the question at rest.

Another objection started is, that the vessel has some goods on board which are not permitted by the licence, which provides, that the return cargo shall consist of grain, meal, flour, and feeds, and in no case of more than one-third of wine: And it is thence contended, that in conformity with the terms of the licence, the cargo must necessarily consist of two-thirds of the first descriptions, and that this condition is a *sine qua non*, and that where it is not complied with the licence is vitiated *in toto*. I cannot think so; as it appears to me, that the restriction is thrown loose by the words "*in no case*," which immediately follow; because,

supposing the parties were not to be permitted to substitute any other articles, those words, which qualify and mitigate the preceding imperative words, would be nugatory. I am therefore inclined to hold, that the terms of the licence are sufficiently satisfied if the quantity of wine does not exceed one-third of the tonnage. There are other goods on board which are not within the enumeration of the licence, and they must of course be condemned, but the penal consequences will not go to affect the licence. It would fall extremely hard upon the commercial interests of the country, if the innocent goods of one merchant should be confiscated on account of the misconduct of another. Such a position would carry the doctrine of infection beyond what is done even in cases of contraband, where the penalty attaches only to the property belonging to the same owner.

The
JONGE CLARA.

August 7th,
1811.

I cannot admit that this licence has been vitiated on any such grounds as those which I have adverted to; but there is a farther objection, which is, that this licence was granted on the 2d *October* 1810 for four months, and it appears that the ship was captured so late as the 4th *July* 1811. This certainly is a circumstance which requires the fullest and most satisfactory explanation, for parties are bound to adhere to the terms of the licence under which they claim protection, unless they can shew that they were prevented from so doing by some unavoidable impediment. Licences are granted upon the exigency of the moment, and it is obvious, that strong reasons of policy may operate with His Majesty's Government to cause or to prevent the granting of them at different times; and it is the business of the Government, and not of the private merchant, to say at what periods this permitted intercourse with the ports of the enemy shall take place.

Wherever

The
JONGE CLARA.

August 7th,
1811.

Wherever the licence has been out of date, the Court has not shewn a disposition to be pedantically narrow on this point, or to notice a trifling excess; but here I think it highly necessary to call upon the parties for some explanation of the delay. In former cases the Court has held the embargo of the enemy to be a sufficient excuse, thinking it hard, that through the act of the enemy the *British* merchant should lose the benefit intended him by his own Government, which would be in effect to place him at the mercy of the enemy. But then the embargo must be satisfactorily proved. The Court cannot so construe a licence, as to allow a ship to proceed to the enemy's port, and to remain there an unlimited time at the discretion of the parties. Now it is certainly unfavourable to this case, that no charter-party is exhibited, binding the master to return, and I observe also, that the papers on board seem to represent the lading of the vessel as having taken place so late as *May* and *June*; a delay which must be fatal to the case, unless it can be shewn that there was an embargo. The master says, that he was under an embargo from *January* to the middle of *June*, but this cannot be considered as a matter proved upon his mere averment. The utmost indulgence I can shew the claimants, is to allow them to establish that fact by other evidence, and such evidence they must possess, as I conceive it to be impossible that the merchants in this country should not have received some intimation of the cause of the detention of the vessel during so many months.

On a subsequent day the Court, upon the production of the further proof, restored the ship and the wine, but refused freight and expences to the neutral master upon the non-enumerated goods condemned, as the vessel was not privileged to carry them.

MINERVA, DAVIDSON.

October 29th,
1811.

THIS was the case of a vessel under *Danish* colours, with a cargo of deals, lathwood, staves, &c. captured on a voyage from *Christiansand* to *Jersey*. A licence was obtained for this vessel by name, by which it was provided that she should go to *Leith*, there to take convoy to the *Downs* or *Portsmouth*, and from thence to take convoy for *Jersey*. The vessel had not gone to *Leith*, but was steering to *Yarmouth* to take convoy there; and the question, therefore was, whether the Court, under such circumstances, could say that the licence had been sufficiently complied with.

Licence on condition of touching at *Leith*—not complied with—condemnation.

JUDGMENT.

Sir *W. Scott*.—This is the case of a vessel which is claimed as protected under a licence; the cargo is asserted to belong to *British* merchants, but I do not observe that it is so set forth in the claim. It is a licence which is granted for this particular ship to carry a cargo from *Christiansand* to *Jersey*, on the condition that she shall touch at *Leith* for convoy. The licence is granted to these *British* merchants on a condition for which they are responsible; they stipulate with Government for a due observance of the terms of the licence, and if the terms are departed from in any essential point, the Court cannot protect the parties from the inevitable consequences. The question then is, has this licence been virtually and substantially carried into execution? Certainly not. Here is not

The
MINERVA.

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a mere departure from a subordinate regulation, it is a fundamental condition of the licence, without which it would not have been granted. The Court is not called upon to enquire into the reasons of this regulation, but it is highly probable that His Majesty's Government may think it proper that vessels with cargoes of this description on board should take convoy at *Leith*, that they may be subject to *British* inspection in that part of their navigation which brings them into the neighbourhood of the ports of the enemy. It is evidently introduced for that purpose, and being so can never be considered as a condition to be waved at the option of the party who has accepted it.—The condition is fundamental, and the breach of it must be fatal. It is not for me to relax those terms on which the publick wisdom has deemed the conveyance of such articles to be consistent with the publick safety.

Nov. 12th,
1811.

ST. IVAN, WACKLIN.

Licence obtained
subsequently to
the date of the
capture — no
protection.

THIS was the case of a *Russian* vessel with a cargo of pitch and tar, which had sailed from *Uleaborg* in *Finland*, on the 16th of *July* 1811, for *London*, and was captured on the following day. A claim was given by the consignees in this country for the cargo as *Swedish* property, stating that they had received a letter from the owners, dated 11th *July* 1811, directing them to apply to His Majesty's Government for a licence permitting the ship *St. Ivan* to proceed from a port in *Sweden* to the port of *London* with a cargo of pitch and tar. Application was accordingly made by them at the Council Office, and a licence was granted,

granted, dated 30th *July* 1811, which was annexed to the claim, together with a letter addressed to the consignees by the owners, dated 11th *July* 1811, stating that they had ordered the master to sail without waiting for the licence, in order to avoid delay.

The
ST. IVAN.

Nov. 12th,
1811.

JUDGMENT.

Sir *W. Scott*.—This ship, which is clearly *Russian* property, was captured on the 17th of *July* 1811, on a voyage from *Uleaborg* to *London* with a cargo of pitch and tar. The ship is claimed as protected under a licence, dated 30th *July* 1811, which is many days after the capture; the question therefore is, whether the licence, which is annexed to the claim, can by any means have a retroactive effect so as to protect this ship and cargo, and I am clearly of opinion that it cannot.

The statute (a) which authorizes the Council to grant such licences as His Majesty was in the habit of granting, can be carried no further than the term licence, which is an instrument in its very nature prospective, pointing to something that has not yet been done, and cannot be done at all without such permission. Where the act has been already done, and requires to be upheld, it must be by an express confirmation of the act itself, or by an indemnity granted to the party; but a licence necessarily looks to that which yet remains to be done, and can extend its influence only to future operations. It is true that it has been held in this Court as well as in the Courts of Common Law (for there have been decisions expressly upon this point), that the King may, for reasons of State, release a prize as against the interest of the captors. The captors bring in their prizes subject to such interposition on the part of the Crown, but it is

(a) 48 G

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ST. IVAN.

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of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as for instance, where the detention of the vessel may be detrimental to the general interests of the country. In such cases there can be no serious doubt of the authority or of the intentions of the Crown. The order for release recites the capture and detention, and proves the knowledge and intention of the Crown acting upon those facts. But the Council has no such power, and could have no intention to go beyond the powers conveyed to it by the act of Parliament; which extends only to the granting of licences.

In the present instance, when the licence was applied for, it was totally withdrawn from the knowledge of the Council that the ship had sailed, still less that she had been taken; for the licence is granted "Upon condition that the vessel shall clear out from the port of *Oregrund* on or about the first day of *September* 1811." The licence, therefore, is clearly out of the question, although the parties seem with great sincerity to have relied on it for protection, as I observe the master, in his instructions, is told to proceed to *Hano* to join convoy, and that there he will receive the licence expected from *England*. But whatever may have been their expectations or intentions it cannot avail them, and it only remains for me to consider, whether the cargo can be protected on any other ground. As to the ship, there can be no doubt what must be its fate, as *Russia* is at war with this country. The cargo, which is documented as *Russian* property, the master says was to be delivered in *London* on account of the owner of the vessel, as he believes, upon the information he derived from the owner in *Finland*, and in this he is confirmed by all the ship's papers. It is true, a claim has
been

been given on behalf of the house of *Falcke* and Co. of *Stockholm*, in opposition to the ship's papers and the depositions; such claims, in opposition to the original evidence, have been in some few instances and under very strong circumstances admitted, but with the utmost jealousy and caution, and never without an explanation in the claim. Here, on the contrary, no explanation, no evidence is offered in support of this *Swedish* claim; it rests upon the mere broad assertion of *Swedish* property. Under such circumstances I am bound to say the claim cannot be admitted; and the cargo, therefore, as *Russian* property, must follow the fate of the ship.

The
ST. IVAN,

Nov. 12th,
1811.

HECTOR, EELS.

Nov. 28th,
1811.

THIS was the case of a vessel, under *American* colours, captured on the coast of *Norfolk*, on a voyage from *Archangel* to *Dublin*, with a cargo of hemp, flax, tar, &c. The licence was for a vessel under any flag except the *French*, to proceed to a port of the United Kingdom, and stipulating that if the vessel should be destined to any port of *this kingdom* south of *Hull*, with naval stores, she should stop at *Dundee* or *Leith* for convoy, which in this instance had not been complied with; and on that ground the captors pressed for condemnation.

Condition to touch at *Leith*, if destined to any port of *this kingdom* south of *Hull*, not held to include the ports of *Ireland*.

JUDGMENT.

Sir *W. Scott*.—It has been held that the words, *this kingdom*, since the union, must generally be considered to mean this United Kingdom, for the kingdom of
 cc 3 *England*,

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HECTOR.

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England, as a separate kingdom, has ceased to exist. If, therefore, this licence was to be construed on a strict technical sense of the words, *Ireland* would certainly be included. But as this Court has been accustomed to construe licences with reference to the probable intention of His Majesty's Government in granting them, and considering that this is a mode of expression not likely to be employed, if the ports of *Ireland* were intended to be included, I think I must understand the condition as applying only to vessels destined to ports of *England* south of *Hull*. It would be an awkward and indirect mode of prescribing the conduct of vessels bound to *Ireland* to distinguish ports of that island as South of *Hull*. And I am confirmed in this view of the subject by the circumstance that late licences which have been granted for the ports of *Ireland*, in which another mode is adopted for securing the delivery of the cargo at the ascertained port of destination, namely, by a clause which makes it imperative on the parties to go north about (a). It is likewise to be observed, that in this licence the words, *this kingdom*, appear to be placed in some degree of opposition or exception to the words *United Kingdom*, which has been used in the antecedent part of the sentence.

(a) In the case of the *Success, Smith*, December 1811, the licence contained the following clause; "If to *Ireland*, the vessel shall go North about; if to any port of *this kingdom*, South of *Hull*, then to stop at *Dundee* or *Leith* for convoy."

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JUDGMENT.

SIR William Scott.—This *American* ship was taken by a *British* privateer, near the mouth of the river of *Bordeaux*, upon the 28th *March* last, with papers for *Gottenburgh*, but certainly going to *Bordeaux*. A claim has been given for the ship and cargo, as the property of *American* citizens. On the part of the Captors it is contended, that the ship and cargo are liable to condemnation under the *British* Orders in Council. On the part of the Claimants it is contended that the operation of those Orders had ceased, the *French* Decrees, to which they were retaliatory having been repealed, and consequently the *British* Orders having expired in point of justice and authority, and according to pledges solemnly and repeatedly given by the *British* Government, that they should cease whenever the *French* Decrees were actually revoked. This case, which involves some other cases that resemble it in the general circumstance of the ships being employed in voyages to and from *France* about this time, has been argued with much zeal and ability, and now stands for the final judgment of the Court.

It is not necessary to travel minutely into the history of the public transactions of the several governments, which have produced this and other questions, arising out of their several public declarations. It is matter of universal notoriety that the *French* Ruler published, in *November* 1806, a Decree dated at

Breach of the Blockade imposed under the retaliatory Order in Council of 26th April 1809. —Revocation of the Berlin and Milan Decrees not proved.—Condemnation.

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Berlin (from whence it usually takes its title), by which he declared the *British* Isles to be in a state of blockade.—That the *British* Government, in *January* and *November* 1807, published Orders of Blockade, the former prohibiting the trade of neutrals *between* ports from which the *British* flag was excluded—the latter imposing a total blockade of those Ports. These orders were intended and professed to be retaliatory against *France*; without reference to that character they have not and would not have been defended; but in that character, they have been justly, in my apprehension, deemed reconcileable with those rules of natural justice by which the inter-national communication of independent States is usually governed. On the 26th *December* following the *French* Government issued an edict, dated *Milan* (from whence it is commonly denominated), by which a still stronger pressure was imposed upon *British* commerce, and *British* maritime warfare. On the 26th *April* 1809, the retaliatory measure on the part of *Great Britain* dated *November* 1807, was restricted in the extent of its local operation, and these two Orders, namely, the Order of *January* 1807, and the restricted Order of *April* 1809, are the Orders now in force, and it is upon the latter that this vessel is proceeded against by the *British* Captor, being taken on a voyage to one of the ports to which the *British* blockades have been restricted. The United States, in *March* 1809, passed a Non-intercourse Act directed against both countries, but accompanied with a legislative declaration that it should cease to operate against either belligerent which should repeal their respective Orders of Blockade. In *August* 1810, the person styled *Duc de Cadore* wrote a letter to the minister of the United

United States at *Paris*, notifying that some sort of revocation of the *French* Decrees had taken place, and that they were to cease to be effective from the 1st *November* in that year. The United States were content to accept this as an authentic and sufficient revocation, and repealed their Non-intercourse Act as against *France*, continuing it as against *Great Britain*, which had not considered this repeal as authentic upon any evidence of its existence which had been furnished, and of course had declined to withdraw its retaliatory Orders. In the month of *May* 1811, this Court condemned the *American* ship *Fox*, and several other ships and cargoes, on the ground of a total absence of all satisfactory proof that the *French* Decrees had been authentically repealed.

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On the 10th *March* in the present year, the *French* Ruler published an official Report of his Minister of Foreign Relations, proclaiming the continued and successful operation of his Decrees. On the 21st *April* the *British* Government published a Declaration, the effect of which I may hereafter more particularly state, but generally authorizing this Court to receive evidence from any foreign Claimants of the repeal of the *French* Edicts, and to decree restitution thereon. On the 20th *May* the *British* Government received from Mr. *Russel*, the *American* Resident at this Court, a paper bearing date 28th *April* 1811, and purporting (as he described it) to be a decree repealing the *Berlin* and *Milan* Decrees so far as concerned *American* vessels. On the 23d *June* this Government issued a Declaration signifying that *American* vessels, captured after 20th *May* (the date of that communication), should not be proceeded against to condemnation, but only detained till certain contemplated events should determine what further course ought to be taken respecting

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ing them. With respect to those captured before the 20th *May* it is silent; they can claim no special benefit from this proclamation. If they can entitle themselves to restitution, it must be by proof given under the Order of *April* last, that the *French* Decrees were actually then repealed, in which case the Court is authorized to restore, without any further declaration on the part of the *British* Government. When I say *repealed*, I of course mean repealed in such a manner and with such formalities as to impose upon other States an obligation of noticing and respecting such repeal. And *Great Britain*, the adverse belligerent, has a right to scrutinize the procedure in the strictest and most inquisitive manner; because not only is it the act of its enemy, to which on that account less faith is due, but because it affects to repeal a measure which was established in its professed origin as a measure of destructive hostility against this country. I have likewise to recollect that the proofs in this case must come from the Claimants almost exclusively, for they must come from the enemy's country, which to the Captors is inaccessible for any purpose, and particularly for that of procuring correct information. The Claimants have been the parties in the transactions; they must be perfectly conversant of the facts; and if *that* which might and ought to have been established with certainty is left a matter of doubt, the consequences will press upon those who have so left it. The burthen lies, therefore, with great responsibility upon them to shew that upon the fair result of these transactions, and of the several attendant documents which they have produced, the question of the title of this vessel, and perhaps others, to restitution, is fairly established.

IN

In examining this question I have to observe, that the *Berlin* and *Milan* Decrees of *France* were ushered into the world with all the solemnity requisite to attract the notice of those that were to be in any degree affected by them—that is, of the whole civilized world in the different characters of allies, neutrals, and belligerents. They were published in the *Moniteur* and other official papers of *France*.—No man who had access to the common vehicles of information could have a doubt of their existence. The interpretation of them might, in many particular respects, be a subject of dispute; but no man could call into controversy their authenticity, their date, or their time of operation. As far as such particulars are required to be established by any rules either of abstract justice, of the conventional law of nations, or of ordinary diplomatic usage, there is nothing to be complained of in these Decrees. These Decrees, both in their original text and by many subsequent declarations (one so late as *March* of the present year) are declared to be *fundamental laws* of the *French* Empire. The meaning of this character so assigned, is not perhaps easy to fix with precision. By fundamental laws (in the meaning of writers on public law, *Grotius*, *Puffendorff* and others) are usually meant such laws as are supposed to be so deeply interwoven in the political constitution of the State as to be above the reach of even the sovereign Power to alter. Such a supremacy of the law above the power of legislation, if it exists any where, could not well be intended here; but it is fairly to be understood (if it carries any meaning at all) that a peculiar character of firmness and sanctity is impressed upon these laws—that *France* considers them as founded upon principles of policy, from which she will not lightly depart; and the only cases in which she would be induced to depart from them are specified in the *Milan* Decree to be two.—One, when

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when Great Britain revoked those particular maxims and usages of war which France affects to reprobate; the other, when neutral nations compel Great Britain to respect their flags. The former event requires no explanation; the other is of less definite meaning: but the general understanding of the world, as guided by the comments occasionally furnished by *France*, had fixed its signification to be, when measures had been taken with effect by a neutral state to *compel Great Britain* to exempt It from the exercise of what She is in the habit of describing as her maritime rights.

In this form were those Decrees given to the world at large, with all the evidence of the most studied notoriety—enforced and protected by such declarations—incorporated by *France* into the body of her laws, with this special character imposed upon them, and expressly handed over for execution to every minister of that government who could have any share in the application of them. Since that time, not contented with her own execution of these laws, She has been pressing the execution of them upon Her allies, by remonstrance, by authority, by force.—She has subverted commonwealths and kingdoms to enforce their execution; and if the causes of a war lately commenced are at all known, it is known that the refusal of a Great Northern State to concur with sufficient activity in the execution of these measures, is in the number of those causes.

Now, in the case of Decrees so promulgated and protected, it might reasonably be expected upon every principle of reason, of good faith, and of honest policy, that if a revocation of any kind did take place, it should be notified in such a manner as to leave no doubt whatever of the fact. It is requisite for the most ordinary exercise of legislation that it should be published to all whom it concerned. This is one of the most elementary

elementary principles respecting every thing in the nature of law. A variety of authorities, collected and cited with much learned industry by Dr. *Stoddart*, concur in establishing the well-known maxim that *decretum non obligat sed promulgatio*. It is unnecessary to add, that such a publication must be authentic, that is, that it must come in such a shape as not to convict itself of fallacy and fraud, because the effect of fraud is to destroy all credit. It is the just fate of him who uses it that *etiam cum verum dicit amittit fidem*. It must likewise be intelligible and clear, for if it is wrapped in obscurity it ceases to be a publication. If these are requisites indispensable in ordinary cases, much more are they so in a professed revocation of a measure to which the attention of the world had been so much called, both in its origin and progress, where so many important interests depended upon the certainty and truth of the revocation, and where no one event had occurred that could lead any man's mind to a conjecture that any such revocation was to take place. For things had continued exactly in the same state; *Great Britain* persisted in the ordinary exercise of her maritime rights, together with that of her retaliatory measures superinduced upon them. No country had compelled her to respect their flag in the sense which I have ventured to attribute to that expression, when the person styled *Duc de Cadore* wrote a letter, dated 5th *August* 1810, to the *American* minister at *Paris*.

That letter (as far as the present subject is concerned) is in these terms; "I am authorized to declare that the *Berlin* and *Milan* Decrees are revoked"—(not will be revoked,)—"and will cease to have their effect "from the 1st *November*." Words cannot be more general, more unconditional than this assertion.—The
assertion

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assertion is of a revocation universal, and a revocation absolute; but unfortunately these expressions follow; “It being *well understood*” (it is not said by whom or on what grounds) “that the *English* shall revoke “their Orders in Council, and renounce their new “principles of blockade, or that the *United States* “will cause their rights to be respected by the “*English*!” How is this clause to be construed? Is it to be considered as constituting part of the Decree of revocation, or merely as an exposition of the motives and expectations, and *understandings* (*bien entendu*) of those who revoke, and not constituting any part of the revocatory Decree? If the former, It converts the absolute Decree into a conditional one. It likewise appears to convert the general Decree into a partial one limited to the *Americans*; for it is their particular conduct that is referred to. In order to ascertain the real nature and meaning of the passage, recourse must be had to the Decree of revocation itself; for it is quite impossible to apply a definite meaning to this letter so framed. Instead of being clear and definite, *all precision*, as it has been described, it is altogether obscure, involved, and contradictory. Under such qualifications it cannot be considered as the Decree of revocation itself, even if all the objections which arise from its non-conformity to all reasonable usage belonging to such a subject, could be waved. Of course, therefore, a demand was made at the time, and has been many times repeated, for the production of the instrument of revocation; which, however, has never yet been produced. This country has denied, on the ground of the non-production, the existence of any such revocation, no Decree or other authentic document having been produced. The reasonableness of this demand and denial, seems to be sufficiently admitted by the act of *France* now set up; for
what

what is it?—The production of an asserted *Decree of Revocation*, thereby admitting that a Decree is the proper form of Revocation; and admitting likewise, in my apprehension, that no such decree existed, as the person designated *Duc de Cadore* referred to; because there cannot be a doubt that if it had, *France* would have founded herself in her present pretension upon *that*, and not upon the Decree now produced of a much posterior date.

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In this state of things what was the natural conduct of a Government acting with fair and honest purposes? Here was a revocation held out as a boon to *America*, the existence of which was denied. Could the Party refuse in such a case the necessary means of proving its existence? If it existed and to any practical effect, the Neutral State had a right to its production. It was a document requisite for the secure enjoyment of the privileges it affected to convey to the Neutral, not only in *France*, but in all the dependent States upon which she had forced her policy.—It was still further necessary, in order to entitle the *Americans* to the benefit of a relaxation on the part of *Great Britain*. For it was notorious that *Great Britain* was pledged to *America* for a repeal of her prohibitions, as soon as it was shewn that *France* had done the like. To leave a doubt, therefore, and a fair doubt upon the fact of revocation was a direct fraud upon *America*, with respect at least to a very large proportion of the advantages she was entitled to. Even if no such Edict had originally existed, if the matter had passed in the slovenly and informal mode of this strange Letter of Monsieur *Champagny*, and in no other, still she ought to have passed and published an Edict immediately, if found necessary, for the satisfaction and security of *America*. If it existed, nothing could be more easy than to produce

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it. It must have existed in an hundred quarters—in the Public Records—in Instructions to the Cruizers—in notifications and orders to the Prize Courts—in a series of restitutions uniformly made under its authority. But no trace of it is to be discovered in any of these quarters. No industry of *American* Claimants, assisted by the zealous importunity of their Government, has been able to extract any such Instrument. When the case of the *Fox*, with several others, came on here in *May* 1811, no other revocation was set up, but that assertion of Monsieur *Champagny*, styled the *Duc de Cadore*, backed by one solitary obscure case of the *Orleans Packet*, as naked of authority as it appeared to be of circumstances. It was urged in that case, that the *American Government* had been content to act upon it.—The Court had only to observe, that the authority of the *American Government* compleatly bound Its own subjects by Its construction of that Letter, but did not at all bind this Court; and that this Court could not judicially arrive at any such conclusion. It has been made matter of some slight observation, that the Court did upon that occasion indulge the Claimants at their own earnest solicitation, and upon repeated assurances that the *American* Resident expected dispatches which would put the matter out of all doubt, with time to bring forward such communications, requiring only that they should come through the regular channel of Its own Government. If the Court can be thought to have exceeded Its powers in this indulgence, It certainly was prompted to do so by the hope that if any such dispatches did arrive, and did pass through the hands of the *British* Government, they would have produced an immediate revocation of the *British* Orders.

ders. It could have little doubt that the evidence which was sufficient to satisfy the judicial conscience of the Court, would be quite enough to satisfy the expectations of the *British* Government.

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Since that time many condemnations have passed here under the subsisting Orders—one or two before the Lords of Appeal. But no allusion has been yet made to any known Act of *French* revocation. This subject has given rise to a great deal of political controversy between the respective Governments. Upon the 8th *May*, 1811, Mr. *Russel* declares, “That no ship
“captured since the 1st *November*, had either been re-
“leased or brought to trial.” Now, I ask, if there had been any admitted existing revocation, how could this possibly have happened? Its existence must have been known to all Persons concerned either in enforcing it, or claiming the benefit of it. How could the *Orleans Packet* have been seized expressly under these Decrees, as Mr. *Russel* asserts, in *December* 1810, by the Director of the Customs at *Bordeaux*, if these Decrees had been notoriously repealed from the 1st *November*. What must have been the conduct of the *American* Master under such an injury?—An instant demand of restitution with costs and damages from the Tribunals. Could the Tribunals have resisted such a demand? She had actually come into the *French* Ports upon the faith of that Letter, which the Supercargo had read at *Gibraltar*. I ask what must be the conduct of this Court, if months after the repeal of the Orders in Council, the Comptroller of the Customs at *Liverpool*, or any other great Port in this Kingdom, were to seize a vessel under those Orders? Could a grosser calumny be suggested than that this Court would not order instant restitution, with as heavy

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costs and damages as It could inflict upon the Seizor? Could such an injury have remained unredressed for a week, if it could by any possibility have been committed? What advice would the Seizor have received from the Law Officers of the Crown, but to get out of such a scrape as fast as he could, *Vel prece vel pretio*? What advice would the *American* Claimant have received from any Practiser in this Court to whom he might have applied?—Why, to demand costs and damages, and not to take back his ship without such compensation. That any remonstrance to Government should have been requisite, any application depending there for a considerable time, and the property restored more than a month afterwards on bond to stand adjudication, on a subject which Mr. *Ruffel* justly describes in terms to be “an act ostensibly proving the continued “operation of the Decrees,” and that bond not given up till the month of *July* 1811, by an act of the State exercising Its prerogative, and not by any act of the Tribunals executing a known Law, are a series of facts which prove decisively two things—one, that the *Duc de Cadore*’s letter was not in itself a revocation of the *French* Decrees; and, secondly, that no other revocation was publickly known.

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In the month of *March* 1812, the *French* Government published an official report of the Minister of Foreign Relations The *Duc de Bassano* as he is styled, announcing the actual existence and the continued successful operation of these Decrees for the last fifteen months: and as far as can be inferred from mere silence respecting *America*, an *unlimited* operation, for there is not the slightest recognition of the *American* exemption, and the terms are as broad and as comprehensive as could have been employed if no such

such exemption had ever existed. It was peculiarly necessary to have adverted to such an exemption, under the doubts that notoriously prevailed respecting it, and the more particularly as *America* had now become the most considerable Power, and according to some of the arguments offered on behalf of the Claimants, the *only* Power to which such a Decree could apply. Under this extraordinary silence, accompanied with the known fact that captures continued to be made, that none were proved to be restored *by any Act of Law*, that no document had been produced, though repeatedly required by *America* in aid of justice, the *British* Government issued a declaration dated 21st *April* 1812, in which It assumed that no revocation had yet taken place, but declared that It would permit foreign Claimants of ships and cargoes to give evidence that these Decrees had been *absolutely* and *unconditionally* repealed before their capture, by some *authentic* act of the *French* Government *publicly promulgated*, and to claim the restitution of them without further order on Its part. By this declaration the Government devolved upon the Court the painful office of ascertaining the fact of a repeal so qualified, amidst all the obscurity in which the fluctuating practice in the conduct, and the studied ambiguity in the language, of the *French* Government might choose to involve it. The Court which had before required that It should be authentically informed of the repeal, with the expectation that such intelligence from the *British* Government would come accompanied with a revocation of Its own correspondent Orders, was now empowered to receive evidence directly from the Claimants without any formal transmission through the hands of the Government Itself. All that was now required being,

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that the information should be conveyed to the Court in such a form as Courts of Justice are in the habit of receiving on the known principles of legal evidence.

This declaration was followed by a communication made by the *American* Minister in this country to the Government, on the 20th *May* last, of an instrument which he described to be “the copy of a Decree, *purporting* to be passed by the Emperor of the *French* on the 28th day of *April* 1811,”—declaring the *French* Decrees to be *non-avenues* from the 1st *November* 1810, with respect to *American* ships.—As it is important to look at the meaning of terms employed in an instrument which claims such a character, I am not afraid of the censure of having viewed them with an hyper-critical attention, when I say that I have thought it necessary to look for the interpretation of these words, which are not either diplomatic or judicial words, in Dictionaries of the best authority of that country, particularly in the *Dictionnaire de L'Academie*; and I there find that the only sense attributed to *avenir* is *arriver par accident*. So that according to this explanation, the word *avenue* if applied with propriety must mean *not having accidentally happened from the first of November*, which appears to be somewhat of an extraordinary mode of describing a positive repeal by an Act of State of something that was existing before. Upon the 23d *June* following this communication, which was made as soon as the *British* Government resumed Its functions after a calamitous event that had in a great measure suspended them, It declared a repeal of Its Orders to take place from the 20th *May*, leaving those vessels which had been taken before to the general operation of the law, and

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and of such edicts as It had previously published in conformity to it; but, certainly without recognizing in any manner the authenticity of this instrument, for the *British* declaration sets out with describing it as an *instrument purporting to be a decree*. It no where describes it as a decree,—the “*instrument*,” *referendo* to the first description is the term employed throughout, and though His Majesty is content to suspend the full operation of the Orders in Council from the date of this communication, it is upon no waiver of any objections to it, but avowedly upon His desire to re-establish the friendly intercourse of nations.

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This instrument being propounded as the decree of repeal on the part of the *French* Government, it becomes my duty to examine whether this is a decree satisfying the requisites contained in the Order 21st *April*. It has been made a question, whether it is not one of those requisites that the *French* repeal shall be subsequent to the 21st *April*, as has been strongly contended by Dr. *Adams*; whether this is a condition literally binding upon the Court; and whether by Its powers of just interpretation, looking to the spirit of the declaration, or by any of Its general powers independent of the declaration, It could apply a repeal which satisfied all other requisites, without satisfying this requisite, if it is so to be considered. I shall not enter into this question, because in the view of the Court, a decision of the principal point can be obtained without particularly considering it. The other requisites are free from all question either of justice or authority, being, in truth, no other than such as the Court would have prescribed to Itself if no Order whatever had prescribed them. The repeal must be *authentic* or it is a nullity; it must be publicly

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licly promulgated or it has no legal existence ; it must be absolute, because, if partial, it *may* be still more injurious to the just rights of the other belligerent than the general prohibition. It never can be admitted, that in a war of general prohibitions between two belligerent States, one shall have a right to carve out its own exemptions, for its own particular convenience, and call upon the other to respect them. It must be unconditional for a similar reason ; for the conditions imposed *may* be only aggravations of the original wrong. A repeal, for instance, on condition of a declaration of war would be more mischievous than the mere general prohibition of commerce. These are requisites not founded in fleeting policy, or in occasional interests, but in universal and immutable justice ; the same to-day as yesterday ; the same at *Stockholm* as at *London*, all other circumstances being the same. And with respect to the power of the Court as to these requisites, it is an idle subject of discussion in a case where both justice and authority unite in conferring them,

The authenticity of the instrument is the first point ; *that*, indeed, on which all the others depend, because, if not authentic, all other questions fall to the ground. It is the title deed under which the parties claim ; they must prove it authentic ; till that is done nothing is done ; if its authenticity is *disproved* nothing *can* be done.

Now, in the first place, what is meant by its being authentic ? By authentic is to be understood *every thing that is requisite to give authority*. It implies internal good faith and truth, and external legitimacy. In the latter sense it must proceed from the authority it lays claim to. It must be genuine,—not spurious,—as the act of that authority ; but that is not enough. It must appear to possess internal good faith and truth ;

it must not be stained with evident falsehood and fallacy ; for on defects of that kind it will lose its authenticity. Those on whom the fraud and fallacy are intended to operate have a right to repudiate it altogether, as of no authority whatever.

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Whether this paper is authentic in the first sense and meaning of the word, as an act of the *French* Government, depends much upon the fact that it has been delivered as *purporting to be such, by the American minister*. The usual mode of authenticating the acts of a Government, is by a general publication avowed, or at least not contradicted, by the Government whose name it bears. So authenticated it proves itself. This document has not, that I know of, appeared in any solemn and public enunciation; recognizing its character ; it has not appeared in any official paper of the Government of *France* ; nor in any communication to any other Government in the world, although almost every other Government was interested in it. The *American* minister does not state from *whom* he received it, nor *when* he received it ; omissions rather to be lamented in a case where dates of time and the vehicles of communication are circumstances of so much importance. I observe, that neither this person styled *Duc de Bassano*, nor Mr. *Barlow* date their verification of the copy, though Mr. *Hamilton*, the *British* Under-Secretary of State, dates his verification on the 3d of last month. Now, I must say, that if this Court accepts it as a genuine instrument under such circumstances, it is very much upon the respect due to the opinion of Mr. *Russel*, though that opinion is expressed with the caution that accompanies it. Assuming, however, that it is to be received as the act of the *French* Government, it remains to be

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seen how far otherwise it is authenticated, as far as its character of truth and good faith is concerned.

The first matter that attracts notice is its date. It attributes to itself to have been executed on the 28th April 1811. The date of such an instrument is of the first importance in support of its claim to veracity and good faith; destroy the date of an instrument, shew that it is false, without its falsehood being referable to mere error, or explained satisfactorily as such, and you falsify the instrument *in toto*. It is a falsification of a fatal kind, particularly where time is concerned. It is a gross deception, and a deception which can have been practised only for purposes of fraud; no part of an instrument so dishonoured can claim an honest attention from any person against whom the fraud is intended.

Now, that this instrument did not exist at the time of its date, or for twelve months after, is established to my satisfaction, by a demonstration that excludes all doubt. Because, if it had been *then* executed, nothing can be more clear than that it must have been produced; yet where is the person who ventures to assert any knowledge of it before the 20th of May 1812. Every motive of just and honourable policy called upon *France* to produce it without hesitation. It was due to the *Americans*, whose property was every day confiscated in *England* and sequestered in *France* on the failure of its production. What motive of just policy could induce any reserve about it? *America* was to be conciliated by its production, and *Great Britain* was to acquire no new privilege unless she followed the example. The Ruler of *France* was therefore called upon by every motive that could influence an honest and an honourable mind to produce it if it existed.

If

If it had been known to the *American* minister at *Paris* there can be no doubt that he would not have kept it back under the pressure of so much public duty and so much forcible application. Equally clear is it that it was totally unknown to the *American* Government; for never till this time has it been in the remotest manner alluded to in the warm intercourse of controversy that has taken place between the two countries. Where is the proof that at this moment it is known to the *American* Government? It appears most clearly, that the long correspondence between that Government and the *British* representative Mr. *Forster*, consisted very much in demands for the production of some such instrument on the one side, and of reasons assigned for not producing it on the other; but such reasons as no where indicate that the *American* Government were ever in the possession or knowledge of any such instrument. In all probability it is now upon its trans-atlantic passage. Nor is it less clear that it was totally unknown to the tribunals of *France*, for, independent of the affirmative evidence of Mr. *Russell* that no such order had reached him in May 1811, there can be no doubt that if it had, it must have disclosed itself in the discussions and decisions of those tribunals. It has been said by Dr. *Arnold*, that it is enough if the order is known to the Courts. Most certainly not; because it is equally necessary to be known to all who are entitled to the benefit of it. Orders are sometimes published in the form of instructions to this Court, but then they are accessible to all; to captors, to claimants, and to every person they employ; as notorious to such persons as to the Court Itself; equally so to the public at large. Is it a matter of any difficulty for any man to possess himself

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himself of all the Instructions that have been issued during the whole of this war. Give the *French* tribunals all the dishonest secrecy you please; you can never suppose a state of things in which they were dealing out restitutions every day without its being at all known to the astonished claimants who received them, that this was all in consequence of a repeal of the grand decrees which had ordered the confiscation. Were the cruizers all this time left without a knowledge of the revocation which was to controul the seizures that had been authorized? To suppose a secrecy and a mystery, and a clandestinity and a doubt on such a subject, is more intelligibly and consistently expressed by describing it at once as a system of studied artifice and fraud throughout.

I should do great injustice to the conduct of Mr. *Russell*—to his acknowledged attention to the duties of his important office, if I referred his entire silence with respect to the existence of such an instrument up to the 20th *May* last to any other cause than his total ignorance of its existence. He was resident in *France* at the time it bears date, attentive to all the transactions in which the interests of his government were concerned; he resided there many months afterwards. No reference was made to any such document during his residence, as far as appears in any answer to the pressing enquiries of the *American* minister here, for the purpose either of procuring a formal repeal of the Orders in Council or the restitution of the *American* property brought into our own ports. On the 8th *May* 1811, he gives an account of a very extraordinary case on the part of the *American* Master of the ship *Grace Ann Green*, who in a most atrocious manner (for so this Court in support of

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of the law of nations is bound to describe it) had risen upon his *British* captors, rescued his ship by violence from them, carried her into a *French* port, and there delivered up nine *Englishmen* prisoners of war to the enemy, to whom he pleaded all these exploits as matter of special merit, which ought to exempt him from the operation of the *Berlin* and *Milan* Decrees. If these Decrees were extinct at the time, there could have been no occasion to plead such extraordinary merits, and the plea could not have been received for any such purpose. But Mr. *Russel* writes that "he was liberated, and he cannot tell whether " on a general revocation or on a special exemption " from those decrees." A *special* exemption! how a special exemption from decrees which according to this paper had had no existence from the 1st *November* 1810, and which his own country had not only declared in terms to be extinct, but had acted upon the declared extinction in the most formal and decisive manner, and had censured and punished the tardiness of this country in doing the like. Mr. *Russel* comes to this country in *September* 1811, and it is not till *May* 1812 that this asserted decree of revocation is produced, under all the stimulating motives which his known zeal for the public service and the private interests confided to his protection furnished for producing it upon occasions that were occurring every day. When finally produced, no explanation is given of the time when it was received, but it is delivered with evident intimations of distrust; for I cannot but allow great weight to the observation of Dr. *Adams*, that Mr. *Russel* distinguishes most studiously between this instrument and the two letters that accompany it, by describing them, as they are, *letters and with the dates actually belonging*

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to them, and this as the copy of a decree that purports to have been passed on such a day.

Taking all this evidence (and much more might be adduced) as resulting from the conduct of the *French* Government viewed in every possible direction; from that of the *American* Government and Its representatives; from that of the *French* Tribunals; — in short, from that of every moral agent whose conduct could be at all connected with this paper; it results that this paper never appeared till above twelve months after it bears date, and that it did not appear, because in truth it did not physically exist. But suppose for a moment that it was really executed at the time it bears date, would that give it a legal existence till it was actually promulged? Certainly not; in all reason and in all practice such an instrument operates only from the date of its promulgation. If accident has delayed for a great length of time the publication, it ought to be re-executed, and with a reference to the real time of its promulgation, or it should be issued with an explanation of the causes that have deferred it, and pointing to the time of its real operation. But if it be sent into the world with its antiquated date, claiming the authority of that date, and of that date only, it has either that authority or it has none. That authority it cannot have, and it is just as deficient in point of honest claim as if the execution had taken place in the fraudulent mode of an antedated instrument. In either way I should depart from the sobriety of judicial language if I described it in the terms that in my apprehension belong to it. It is one other instance of the exorbitant demand which that person is in the habit of making upon the credulity of mankind. It is sufficient to observe that, in my judgment,

ment, its authority is fully disproved ; that it comes into the world with such indisputable characters of falsehood as utterly destroy its operative credit. I have no doubt that the true conclusion arising from the course of facts is, that this paper owes its birth to the *British* declaration of the 21st *April* 1812 ; that it is a later production of this same year, and that it claims an earlier origin only for such purposes as it is the duty of all courts of justice to defeat.

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If this conclusion be just, it follows that all attempts to prove the operation of such a document must fail, because it is impossible to prove the operation of a document which did not exist. If you even proved in some instances a course of practice similar to that which the document holds out, it would by no means establish the existence of such a document, because such a practice might take place independently of any such document. It likewise appears to follow that the Court cannot make the order prayed for further proof, because if it is once established that the document is born with such a stain of corruption in its very essence and constitution, it is out of the reach of any purifying means that can be applied to it ; and least of all of such as are to be applied by those to whom it owes that vitious essence and constitution. They who fabricate such an instrument will fabricate the means of supporting it, and this Court does not, where imposition is intended upon Itself, resort for proofs of good faith to the *officina fraudis* which attempted the imposition.

In the next place what are the auxiliary proofs that are now offered as to matter of fact ? There are two letters which do not at all refer to this paper, being both prior in date ; one of them, the letter to the *Conseil des Prises* suspensive upon the future fact of the

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of a direct and authenticated assertion of the fact. The very form in which Mr. *Russel* has deposed to the fact is, I think, the strongest proof that it is not a fact upon which a very considerable degree of doubt is not reasonably to be felt. Mr. *Russel* states, “ that several
“ cases have come to his knowledge, in which restitu-
“ tions have been decreed to the claimants, although the
“ vessels would have been liable to condemnation under
“ the *Berlin* and *Milan* Decrees,” but without stating any particular cases. Here are no copies of the decrees of the Courts before whom those cases were brought, nor indeed any assertion that the restitutions were made by the authority of the Courts—that they were not made by the authority of the State Itself. This is the whole of the information that Mr. *Russel*, upon his own knowledge and from his own belief, conveys to the Court.

With respect to what has passed since the month of *September*, when Mr. *Barlow* succeeded him in the mission, he says, “ that he has been informed by the
“ *American* minister resident at *Paris*, that there has
“ not been an instance of the application of the *Berlin*
“ and *Milan* Decrees to an *American* vessel or cargo
“ since the month of *September*; that many vessels
“ and cargoes had been restored to the lawful owners
“ thereof, which would have violated those decrees
“ had they been in force; that he has no doubt but
“ more specific information as to cases restored in the
“ *French* Courts of Prize, might be procured from the
“ records of the said proceedings;” On which assertion undoubtedly the question arises, why such information has not been procured? because it being perfectly well known that it has been a question long depending, whether this was a law promulgated to the Courts, and which the Courts were bound to carry into exe-
cution,

cution, it certainly was the natural duty of the claimants to have provided themselves with the most indubitable proofs, shewing these restitutions had taken place. This assertion of Mr. *Russel* destroys the supposition of Doctor *Lushington*, that no more authentic proofs could be obtained, because it is admitted by Mr. *Russel* in this assertion, that there is no doubt whatever that, if further time were allowed, more specific proof of the proceedings of the Courts might have been produced.

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I come now to consider the particular cases mentioned in the letters, because, giving to the general averment of Mr. *Barlow* all the respect due to the assertions of an accredited minister upon such a subject, residing at another Court, it still remains my duty to consider what are the special cases he has produced in support of them, inasmuch as those cases may tend to shew upon what grounds this general averment has been constructed, and how far the statement it contains has been accurately extracted from such premises. In the letter bearing date 29 *January* of the present year, he mentions this case: "The ship
" *Acastus*, Captain *Cottle*, from *Norfolk*, bound to
" *Tonningen*, with tobacco, had been boarded by an
" *English* frigate, and was taken by a *French* privateer
" and brought into *Fecamp* for the fact of having been
" so boarded." Evidently, therefore, in the opinion at least of the *French* privateer, which had received no revocatory orders, the *Milan* Decree was at this time in actual operation, for the capture was made upon the express ground of a contravention of the *Milan* order. "On the 2d *January*," he says, "I
" stated the facts." To whom?—not to the tribunals at *Paris*; not to the tribunals in that district into which the ship was brought; nor does it appear that

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the claimants applied to those tribunals; but “in a few days afterwards the ship and cargo were ordered by the Emperor to be restored to the owners, upon condition;”—upon what condition?—“that she had not violated the *French* navigation laws.” Now, upon what pretence could the *French* navigation laws possibly be applied to this ship?—a ship bound from *Norfolk* in *America* to *Tonninger*, no part of the *French* dominions. The navigation laws of a country are confined to a trade to or from that country. Our navigation laws, for instance, undoubtedly have a right to prescribe rules to be observed by foreigners trading to or from this country; but do they pretend in any manner to intermeddle with the navigation of foreign States, as between themselves? In what way could the *French* navigation laws apply to such a case as this? Belligerent Orders might, but navigation laws could not at all. To whom, however, are these navigation laws referred?—They are referred to the *Council of Prizes*. The Council determine that no such violation had taken place, as certainly no such violation could possibly have taken place; and then she is delivered,—but delivered by the Emperor.

The next case to which this gentleman refers in his subsequent letter, is that of the schooner *Fly*; and it is this: “She was of and from *New York*, loaded with cotton, sugar, and coffee, bound to *St. Petersburg*, and taken by an *English* cruizer, and carried into *Cowes*; thence released.” Does she go to *Petersburgh*, the place of her destination? No, she goes into *Havre*. Why then here is a fraudulent case of a ship bound ostensibly to *Petersburgh*, but bound really to *France*; she was released at *Cowes*, and then pursued her fraudulent voyage into the *French* port to which she was destined. “She declared

“clared the facts as above related,” which she might undoubtedly do with perfect safety, having contrived and effected a fraud for the supply of *France*; and she was reloaded with *French* goods, and departed without molestation. Such a case as this I do not consider as of any authority, where such a fraud had been practised by a vessel in favour of *French* commerce, for the supply of *French* necessities, and a ship, as I likewise observe, under *French* licence.

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The next is the case of “the ship *Phæbe*, from *Boston* to *Civita Vecchia*, laden with colonial produce, which had been boarded, arrived, entered, sold, and now re-loading for departure.” This is another licence case—a case peculiarly favoured and distinguished, because, undoubtedly, when a Licence is granted to import goods into *France*, I cannot conceive that any case can occur in which the *Berlin* and *Milan* Decrees can be applied to ships so privileged, and conforming (as far as their own voluntary conduct was concerned) to the terms of the licence. An exemption from the *Berlin* and *Milan* Decrees must indisputably be considered to be granted on account of any involuntary acts to which the ship had been subjected in the voyage. She had been boarded by an *English* cruizer while sailing with a *French* licence, and for the purpose of the supply of the markets of *France*.

The case of “the ship *Recovery* of *Boston*, boarded, arrived, and entered, as above at the same place, now selling her cargo,” is another of these licence cases which was freighted at the same place.—Out of these seven cases here are two others, which are by decrees of the *Emperor*, not by decrees of the courts; and one other case, which is the case of “the

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“ Brig *Ann Maria*, bound to a port in *France*, put
“ into *Falmouth*, then came to *Morlaix*, entered, sold,
“ bought, reloaded, and departed as above.” There is
no proof whatever that the fact of her touching at
Falmouth was at all known, or that she had declared
his fact, nor is any explanation given upon what au-
thority she had been restored, whether by an act of
the State, or by an act of the Tribunals.

Of these seven cases then which are specially re-
ferred to, three are cases of vessels under licence, in
which an actual and special protection had been given,
two are restored, not by judgments of the Tribunals
acting upon the known law, but by the act of
the person exercising the sovereign powers of the State
in a way that suited his policy or his fancy in the
particular case: and in one of the other two it does not
at all appear that the fact was known that the ship had
violated the *French* Decrees by visiting an *English* port.
So that one only remains, and what the real circum-
stances of that case were it is quite impossible for the
captors to investigate—they may be such, as if known
would prevent the case from being of any authority
whatever. This I see, that the case is without
date—that the ship was originally destined to a *French*
port—that she had only been visited by a *British*
cruizer, and had not been seized by any *French* cap-
tor on her arrival.

To the observation I have already made on the
practice, as insufficient to support this document even
if proved, I will only add, that if there were a prac-
tice founded upon any such decree, it must have been
a practice uniformly, universally, and notoriously pro-
ceeding upon all such cases since the 1st *November*,
1809. There must be a numerous and an uninter-
rupted

rupted series, accompanied (unless there has been gross negligence on the part of the Claimants) with regular proofs now ready to be produced. This would have been legal evidence well entitled to the attention of the Court, in proof of the non-execution of the *Berlin* and *Milan* Decrees, in consequence of an authentic revocation publicly promulged. I do not entirely accede to the position of Mr. *Ruffel* that the non-existence of the *decree can only be proved by the promulgation of the repeal, and by the non-execution of the decree*, because the mere non-execution may prove nothing but the present suspension of the decree pretended to be repealed. The property may remain in a state of detention within the grasp of the decrees, whenever it is thought fit to call them into action. It is not the mere present non-execution of the rule, but an execution of a contrary rule introduced by the repeal, that is the proper evidence. Shew an authentic and public repeal, shew that repeal followed up, not by a mere cessation, but by immediate liberation under sentence of the Courts, and a judgement of costs against those who presume to infringe it. That is the proper evidence in which the other belligerent may be expected to acquiesce—but it is evidence of a very different nature indeed from that which is furnished by the representation given in one of the letters alluded to, that “in the month of *May* 1811, not one vessel captured since the 1st of *November* had been either released or brought to trial.”

It is hardly worth while to advert to three affidavits offered to the Court, by which it appears that three *American* vessels bound to *British* ports, had been examined by *French* privateers and suffered to proceed. I do not find that any reference was made to the repeal of

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of the *Berlin* and *Milan* Decrees, as the motives for such releases. They might be for reasons of private convenience, such as often occur in the cases of *British* ships which are released by the enemy, when the cruizer is already encumbered with as many prizes as she can dispose of. Or they might be in consequence of special orders for special purposes—for the public service of *France*, or for the purpose of giving a colour now and then to such suggestions as are now offered to the Court. To be sure if these cases are to be taken as they are described, they prove too much : they prove not only that the *French* have repealed their own *Berlin* and *Milan* Decrees, but that they have renounced their own most undeniable right under the general Law of Nations ; namely, of seizing contraband of war going to an enemy's port, for two out of these three cases, are cases of naval stores coming to this country.

If it be asked whether in the evidence adduced several restitutions do not appear to have been made of *American* ships confiscable under the *Berlin* and *Milan* Decrees ; I answer without reserve, that I believe there may have been such instances. It would be indecent to deny what these gentlemen have averred in general terms, though their specific instances are very unsatisfactory. But, I answer further, that these restitutions have been acts of State proceeding on motives of policy, or humour in the particular instances—not judgements of tribunals acting upon a known law, at the instance of parties who claim the benefit of it. It was said on behalf of the claimants, that we have no right to dictate to *France* modes of restitution ; I answer that we undoubtedly possess such a right, because the Law of Nations authorizes us to make a demand of that kind.

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The Law of Nations obliges every maritime country to have tribunals of this species, from which injured parties have a right to demand redress, not *ex gratiâ* or as matter of court favour, but *ex debito justitiæ*. And it is no answer when we call for a *law*, to shew us a particular act of State that has done the same thing. If they proceeded upon the law, shew the law in the usual manner by the production of the edict itself, by recorded applications of it in a legal form, and by the testimony of eminent professors of the law. If you can shew no such thing, it leaves the matter open to the conclusion which has a good deal of other collateral authentic history to support it, namely, that the *French* Ruler reserved this subject entirely to his own sovereign will and pleasure; that he granted restitutions and refused restitutions very much at his own special discretion, with little interference on the part of the tribunals. I think strong traces of this are to be found in the correspondence of Mr. *Russel*; sometimes the “Emperor refuses to permit any *American* cases to be reported to him,” though all depending upon his decision. At other times “he declines,” as stated by Mr. *Russel*, “taking any decision with regard to the list, before it had been submitted to,” what? not to the Council of Prizes, but to the Council of Commerce. Then comes a journey to *Cherbourg*, and fetes and festivals, and the matter is adjourned *sine die*. No wonder that the *French* cruizers should betray a very inconsistent practice of their own in such an uncertain state of things—what to take or what not to take.—But what this country demands, is a clear and determinate rule of law, acted upon in a clear and determinate manner; not a crooked and fluctuating practice, bending to present policy or even to present humour, in such a manner as to leave no certainty to guide any individual, or
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any State that looks to it for the direction of her conduct. If the matter is left in a state of uncertainty it is enough ; because if honestly meant and fairly authenticated, no possible doubt could hang upon it. It would be enough that the matter was left in a questionable shape as to whether the decrees were revoked or not, or how they had been revoked. But the case, in my apprehension, goes much further, it goes to the effect of establishing that no such revocation has actually taken place.

Having arrived, at least in the conviction of my own judgment, to the conclusion, that the instrument relied upon is a false and fraudulent instrument, without good faith, without authenticity, and without promulgation, it becomes less necessary for me to consider how far it would have satisfied the other requisites prescribed in the Order, if it had not been an instrument totally deficient in these primary and fundamental qualifications. I shall, therefore, not impose upon myself the task of enquiring how far, in the case of such general Decrees, violating the rights of neutrals universally, a revocation of them in favour of any one State, calling Itself neutral, is entitled to the respect of the other belligerent whose rights may be more deeply affected by the partial revocation than by the general prohibition itself—how far the State, which has imposed the injurious prohibition, has any right to make such a selection of neutrals more than It had the right to impose the original prohibition—how far a State, calling Itself neutral, has a right entirely to disband from the common confederacy of civilized nations, and to accept, as a mere indulgence to Itself, that which It ought to claim and possess as the common birth-right of all neutral States whatsoever—how far
It

It is at liberty, consistently with any known principles of general justice, or of national good faith, by such an acceptance for Its own temporary convenience, to concur in establishing principles immediately fatal to the rights of all other neutral countries, and ultimately and consequentially to Its own ;—and if It is not so at liberty, to what extent of opposition beyond the indignant rejection of such selfish favours, if they are so offered, It is bound to carry Its resistance. These are momentous questions—and they become more momentous if the assertion of a right to accept such selfish advantages upon a species of dereliction of neutral rights and duties, should be coupled with the assertion of a still more noxious right to accept them upon terms which can have no other merit allowed to them than that of qualified hostility to the other belligerent. For the neutral State to contend against that belligerent that she had accepted such terms, had acted upon them, and by such acceptance and acting had a right to insist that the conditional bargain had ceased to be conditional and ought now to be considered as absolute against Him, does seem something of a pretension not very consistent with the expectation of a ready acquiescence on the part of that other belligerent.—It were much to be lamented, if a state of things should exist which called for the discussion of such questions. The conclusion to which I have arrived excludes the necessity of enquiring whether such a state of things *does* exist, and what decision ought to be applied to the questions arising out of it. It is equally unnecessary to enquire whether the acceptance of any conditions (be their nature what it may, even future, prospective, or continuous, as Dr. Stoddart has observed), leaves the revocation still in a conditional state, or converts it into an absolute one

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(though the conditions are still resting in future unexecuted performance), together with several other minor considerations on which much learned industry has been bestowed. Such as whether the revocation, if it existed, was absolute even with respect to all the claims of the favoured neutral—whether it comprized cargoes as well as ships—and whether it extended to the protection of *American* property on board the vessels of other neutral countries, or of the products of *England* on board *American* vessels, become *American* property by purchase.

With these observations I dismiss this case, having brought to the consideration of it, as I trust, all that impartiality and independence of mind so strongly pressed upon me by advice, of which I should be less disposed to doubt the propriety, if I had in the slightest degree felt the necessity. In a case which, though not attended with much difficulty, is not without its delicacy, I have endeavoured to discharge my duty as in other cases, certainly without any disregard to the satisfaction of other minds, but indispensably to the satisfaction of my own. If that satisfaction has been acquired upon principles erroneously assumed or applied, it is my consolation, in this as in other cases, that those principles may receive their correction from the proper authority.—For without taking upon myself to say how they *ought not* to be corrected, I may venture to intimate that the law and constitution of this country point to the tribunal of appeal as the proper Forum by which the judgements of this Court are primarily and properly to be examined. Acknowledging with all respect that authority, I pronounce that this ship, and the other *American* ships, captured before the 20th *May*, are liable to condemnation—and that those which have been captured since,

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are entitled to the benefit of the protection, held out in the Declaration of 23d *June*—a Declaration founded not upon the faith of that pretended revocation of the *French* Decrees, but upon motives of conciliation, upon the desire entertained and expressed by His Majesty of re-establishing the intercourse between neutral and belligerent nations upon its accustomed principles.

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APPENDIX.

O.

Extracted from the Registry of His Majesty's High Court of Admiralty of England.

Sir,

Foreign Office, *June 4th, 1812.*

IN reply to your Letter of this day's date, addressed to Viscount *Castlereagh*, requesting to be furnished, for the information of the captors in the cases of the ship *Vestal* and other *American* vessels; with copies of a Letter from the *French* Minister of Justice to the Council of Prizes, dated the 25th of *December 1810*, and of another of the same date from the *French* Minister of Finance to the Director General of the Customs, I am directed by his Lordship to transmit to you herewith Copies of the said Documents, together with a Copy of the Letter from Mr. *Russell*, the *American* Chargé des Affaires at this Court, which accompanied the same, and the Copy of the Decree of the *French* Government, dated the 28th of *April 1811*, referred to in your said Letter.

I am, Sir,

Your most obedient humble Servant,

WILLIAM HAMILTON.

To the King's Proctor,
Doctors Commons,
&c. &c. &c.

Translated from the French.

Paris, the 25th December 1810.

COPY of a Letter addressed by his Excellency the Grand Judge Minister of Justice to the Counsellor of State, President of the Council of Prizes.

To his Excellency the President.

Sir,

THE Minister for Foreign Affairs, in conformity to the orders of His Majesty the Emperor and King, addressed, on the 5th of *August* last, to the Minister Plenipotentiary of the United States of *America*, a Note, containing the following words :

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“ I am

A P P E N D I X.

“ I am authorized to declare to you, that the Decrees of *Berlin*
“ and *Milan* are revoked, and that dating from the first of
“ *November* they will cease to possess their effect, it being how-
“ ever well understood, that in consequence of this declaration
“ the *English* shall revoke their Orders in Council, and shall
“ renounce those new principles of blockade which they have
“ wished to establish, or else that the United States, conform-
“ ably to the Act which you have just communicated, shall cause
“ their rights to be respected by the *English*.”

In consequence of the communication of this Note, the President of the United States published, on the 2d of *November*, a Proclamation, announcing the revocation of the Decrees of *Berlin* and *Milan*, and declaring, that in consequence thereof all the restrictions imposed by the Act of the 1st of *May* should cease, in regard to *France* and her dependencies.

The Department of the Treasury on the same day addressed a Circular to all the officers of the *American* customs, directing them to admit into the ports and waters of the United States *French* armed vessels, and ordering them to apply, reckoning from the 2d of *February* next, to *English* ships of all descriptions, and to merchandize proceeding from the growth, manufacture, and commerce of *England*, and her dependencies, the law prohibiting all commercial relations, provided that at the said period the revocation of the *English* Orders in Council, and of all acts invasive of the neutrality of the United States, shall not have been announced by the Department of the Treasury.

In consequence of the government of the United States having thus engaged to cause their rights to be respected, His Majesty directs, that all causes pending in the Council of Prizes, concerning prizes made of *American* vessels, dating from the 1st of *November*, and such as shall from henceforth be brought in, are not to be adjudged according to the principles of the Decrees of *Berlin* and *Milan*, but that they are to remain suspended, the vessels taken or seized before being only under sequestration, and the rights of the proprietors being reserved to them till the 2d of *February* next, the period when the United States, having performed their engagement of causing their rights to be respected, the captures are to be declared by the Council to be null and void, and the *American* vessels restored with their cargoes to their owners.

Accept, &c.

(Signed) Le Duc de MASSA.

(A true Copy.)

The Minister for Foreign Affairs,

(Signed) Le Duc de BASSANO.

A P P E N D I X.

Translated from the French.

Paris, the 25th December 1810.

COPY of a Letter addressed by his Excellency the Minister of Finances to the Count de *Sassy*, Counsellor of State, Director General of Customs.

Monfieur the Count,

ON the 5th of *August* last the Minister of Foreign Affairs wrote to Mr. *Armstrong*, the Minister Plenipotentiary of *America*, that the Decrees of *Berlin* and *Milan* were revoked, and that from the 1st of *November* they would cease to possess their effect, it being however well understood, that in consequence of this declaration the *Engliff* should revoke their Orders in Council, and should renounce those new principles of blockade which they have wished to establish, or else that the United States, conformably to the Act communicated, should cause their rights to be respected by the *Engliff*.

Upon the communication of this Note, the President of the United States issued, on the 2d of *November*, a Proclamation, announcing the revocation, reckoning from the 1st of *November*, of the Decrees of *Berlin* and *Milan*, and declaring, that in consequence thereof all the restrictions imposed by the Act of the 1st of *May* should cease, with respect to *France* and her dependencies.

On the same day the Department of the Treasury addressed a Circular to the agent of the customs, ordering them to admit into the ports and waters of the United States *French* armed vessels, and enjoining them to apply, reckoning from the 2d of *February* next, the Law of the 1st of *May* 1809, prohibiting of all commercial relations to *Engliff* ships of all descriptions, as well as to the merchandize of the growth, commerce, and manufacture of *England*, and her dependencies.

His Majesty having in these two Acts seen the indication of the measures which the *Americans* are about to take, from the 2d of *February* next, to cause their rights to be respected, has commanded me to signify to you, that the Decrees of *Berlin* and *Milan* are not to be applied to any *American* vessel that shall have entered into our ports since the 1st of *November*, or that may henceforwards, and that such as have been sequestered as having acted in contravention to the Decrees shall be the object of a special report.

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On the 2d *February* I shall communicate to you the intentions of the Emperor upon the definitive step to be adopted to distinguish and favour *American* navigation.

I have the honour, &c.

(Signed) Le Duc de GARTO.

(A true Copy.)

By authorization of the minister, in his absence,
the chief of the Division of Consulate,

(L. S.) (Signed) D. HERMAND.

(A true Copy.)

(Signed) J. BARLOW.

COPY.

THE undersigned Chargé d'Affaires of the United States of *America* has the honour to transmit to Lord *Castlereagh* authentic copies of a Decree, *purporting* to be passed by the Emperor of the *French*, on the 28th day of *April* 1811, of a letter addressed by the *French* Minister of Finances to the Director General of the Customs, on the 25th day of *December* 1810; and of another letter of the same date, from the *French* Minister of Justice to the President of the Council of Prizes.

As these acts explicitly recognize the revocation of the *Berlin* and *Milan* Decrees, in relation to the United States, and distinctly make this revocation to take effect from the 1st of *November* 1810, the undersigned cannot but persuade himself that they will, in the official and authentic form in which they are now presented to His *Britannic* Majesty's Government, remove all doubts with respect to revocation in question, and joined with all the powerful considerations of justice and expediency so often suggested, lead to a like repeal of the *British* Orders in Council, and thereby to a renewal of that perfect amity and unrestricted intercourse between this country and the United States, which the obvious interests of both nations require.

The undersigned avails himself of this opportunity to assure his Lordship of his highest consideration.

(Signed) JO^N RUSSELL.

18, *Newinck Street*, 20 *May* 1812.

A P P E N D I X.

Translated from the French Language.

Palace of *St. Cloud*, 28th *April* 1811.

NAPOLEON, Emperor of the *French*, King of *Italy*, Protector of the Confederation of the *Rhine*, Mediator of the *Swiss* Confederation.

ON the report of our Minister for Foreign Relations.

Seeing the law of the 2d *March* 1811, by which the Congress of the United States ordered the execution of the provisions of the Non-intercourse Act, prohibiting the introduction into *American* ports of ships and merchandize of *Great Britain*, her colonies and dependencies :

Considering that the said law is a measure in opposition to the arbitrary pretensions ordained by the Decrees of the *British* Council, and a formal refusal to adhere to a system hostile to the independence of neutral powers and their flag,

We have decreed, and do decree as follows :

The *Berlin* and *Milan* Decrees, from the 1st *November* last, are definitively considered as not having existed with respect to *American* Vessels.

(Signed) NAPOLEON.

By the Emperor,

The Minister Secretary of State,

(Signed) The Count DARU.

(A correct Copy.)

The Minister for Foreign Relations,

(Signed) The Duke of BASSANO.

(A true Copy.)

(Signed) JOEL BARLOW.

(A true Copy.)

Foreign Office, *July* 3d, 1812.

(Signed) WILLIAM HAMILTON,
Under Secretary of State.

P.

CONSERVATIVE SENATE.

SITTING OF MARCH 10.

THE Sitting opened at noon, in the presence of his Serene Highness the *Arch Chancellor of the Empire*, His Serene Highness the Prince *Vice-Constable* was present at it.

[h 3]

Their

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~~_____~~ _____, Minister of State, and
~~_____~~ _____, being introduced, his Excel-
~~_____~~ _____ Minister for Foreign Affairs, com-

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~~_____~~ act of nations. This
~~_____~~ treaty, has come
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~~LOCATIONS LISTED ABOVE, THE FOLLOWING PERSONS SHOULD BE TAKEN,~~
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“ It was in 1806 she began the execution of that system, which tended to bend the common law of nations before the Orders of Council, and the regulations of the *London* Admiralty.

“ The declaration of the 16th of *May* annihilated by one single word the rights of all maritime states,—placed under an interdict vast coasts and whole empires. From this moment *England* no longer acknowledged any neutrals upon the seas.

“ The Decrees of 1807 imposed upon every vessel the obligation of touching at an *English* port, whatever her destination might be, to pay a tribute to *England*, and submit her cargo to the tariffs of the customs.

“ By the declaration of 1806 all navigation had been interdicted to neutrals; by the Decrees of 1807, the power of navigating was restored to them; but they could use it only for the common utility of *English* commerce, in the combinations of its interests and its people.

“ The *English* Government thus tore off the mask with which it had covered its projects,—proclaimed the universal dominion of the seas,—regarded all nations as its tributaries,—and imposed upon the Continent the expenses of the war which it maintained against it.

“ These unheard-of measures excited a general indignation among the Powers who preserved the sentiment of their independence and their rights: but in *London* they raised the national pride to the highest pitch; they held out to the *English* people a future prospect, rich in the most brilliant hopes. Their commerce, their industry, were henceforth, to be without opposition; the produce of the two worlds was to flow into their ports—pay homage to the maritime and commercial sovereignty of *England*, by paying tribute,—and afterwards arrive to other nations, loaded with the enormous expences from which *English* merchandize alone would be free.

“ Your Majesty, at a single glance, perceived the evils with which the Continent was threatened. You instantly applied the remedy. You annihilated by your decrees this pompous, unjust attack upon the independence of every state and the rights of all nations.

“ The *Berlin* decree answered the declaration of 1806. The blockade of the *British* Islands was opposed to the imaginary blockade established by *England*. The *Milan* decree answered the orders of 1807: it declared *denationalisé* every neutral vessel that submitted to *English* legislation, either by touching at a *British* port,

A P P E N D I X.

or paying tribute to *England*, and which thus renounced the independence and rights of his flag. All merchandize proceeding either from *rural* commerce or industry, was blockaded in the *Britannic* islands: the continental system banished them from the continent.

Never did any act of reprisals attain its object in a more prompt, certain, and victorious manner. The *Berlin* and *Milan* decrees turned against *England* the arms she had directed against universal commerce. That source of commercial prosperity which she believed to abundant, became a source of calamities to *British* commerce: in place of those tributes which were to have enriched the treasury, her credit was deteriorated, hurting the fortune of the state and that of individuals.

“As soon as your Majesty’s decrees appeared, all the Continent foresaw that such would be their result if they received full execution; but, however accustomed to *Europe* was to see success crown your enterprizes, she could scarcely conceive by what *new prodigies* your Majesty would realize the great designs which have been so rapidly accomplished. Your Majesty armed yourself with all your power: *nothing could divert you from your intention*; *Holland*, the *Hanseatic towns*, the coasts that unite the *Zuydersee* to the *Baltic* sea, were united to *France*, and subjected to the same administration and same regulations,—the immediate and inevitable consequence of the legislation of the *English* Government. No kind of considerations could balance in the mind of your Majesty the first interest of your Empire.

“You did not long wait to reap the advantages of this important resolution. *In fifteen months, that is to say, since the Senatus Consultum of reunion, your Majesty’s decrees have weighed with all their force upon England*. She flattered herself with invading the commerce of the entire world; and her commerce, become a speculation, does nothing but by means of 20,000 licences, delivered each year. Forced to obey the law of necessity, she thus renounces her act of navigation, the principal foundation of her power. She pretended to the universal dominion of the seas; and navigation is interdicted,—her vessels shut out from all the continental ports. She wished to enrich her treasury by the tributes which *Europe* would pay; and *Europe* has not only freed itself from her unjust pretensions, but also from the tributes it would have paid her industry; her manufacturing towns are become deserts; distress has succeeded a prosperity hitherto increasing; an alarming disappearance of money, and the absolute want of employment,

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ployment, daily disturb the public tranquillity. Such have been to *England* the consequences of these imprudent attempts. She already perceives, and can daily more and more discover, that there is no salvation for her, but in a return to justice, and to the principle of the rights of nations ; and that she can only participate in the benefit of the neutrality of ports, inasmuch as she allows neutrals to benefit by the neutrality of their flag. *But till the British Orders of Council are rescinded, and the principles of the treaty of Utrecht towards neutrals are again in full vigour, the Berlin and Milan Decrees will remain against those powers who allow their flag to be denationalised. The ports of the Continent shall not be open either to denationalised flags, or British merchandize.*

“ It must not be dissembled, that to maintain in full vigour this grand system, it will be necessary that your Majesty employ all the powerful means which belong to your empire ; and find in your subjects that assistance which you have never yet in vain demanded of them. *It is necessary that all the disposable French forces should march to whatever places where the English or denationalised flag attempt to land.* A special army, charged exclusively with guarding our vast extent of coasts, our maritime arsenals, and triple range of fortresses which cover our frontiers, will answer to your Majesty for the safety of the territory confided to their valour and fidelity. You will send to their fortunate destiny those brave men accustomed to fight and to conquer under the eyes of your Majesty, —to defend the political rights and exterior safety of the empire. The depots even of the corps will not be turned from the useful destination of supporting your active armies. The forces of your Majesty will thus always be maintained upon the most formidable footing, and the French territory protected by an establishment which interest dictates ; the policy and dignity of the empire will be placed in such a situation, as to entitle it more than ever to deserve the title of inviolable and sacred.

“ For a considerable time the *English* Government has proclaimed everlasting war,—a frightful project, which the wildest ambition could never really have intended, and which presumptuous boasting alone allowed to escape ; a frightful project, which nevertheless will be realized, if *France* is but to expect engagements without guarantee,—of uncertain duration, and more disastrous than war itself.

“ Peace, Sire, which in the midst of your immense power has been so often offered to your enemies, will crown your glorious works, if England, banished from the Continent with perseverance,
5 and

A P P E N D I X.

and separated from all the states whose independence she has violated, consents to return to those principles upon which *European* society is founded,—acknowledges the Law of nations,—and respects the sacred rights consecrated by the treaty of *Utrecht*.

“ In the mean time the *French* nation must remain armed; honour commands it; the interest, the rights, the independence of the people, engaged in the same cause, demand it; and an oracle still more certain, often delivered even from the mouth of your Majesty, constitutes it an imperious and sacred law.

Q.

At the Court at *Carlton House*, the 23d of *June* 1812,
Present,

His Royal Highness the Prince Regent in Council.

WHEREAS His Royal Highness the Prince Regent was pleased to declare in the name and on the behalf of His Majesty on the 21st day of *April* 1812, “ That if at any time hereafter, the *Berlin* and *Milan* Decrees shall, by some authentic act of the *French* Government publicly promulgated, be absolutely and unconditionally repealed, then and from thenceforth the Order in Council of the 7th of *January* 1807, and the Order in Council of the 26th of *April* 1809, shall without further order be, and the same are hereby declared from thenceforth to be wholly and absolutely revoked.”

And whereas the Chargé des Affaires of the United States of *America* resident at this Court, did, on the 20th day of *May* last, transmit to Lord Viscount *Castlereagh*, one of His Majesty's Principal Secretaries of State, a copy of a certain instrument, then for the first time communicated to this Court, purporting to be a decree passed by the Government of *France* on the 28th day of *April* 1811, by which the Decrees of *Berlin* and *Milan* are declared to be definitively no longer in force in regard to *American* Vessels.

And whereas His Royal Highness the Prince Regent, although he cannot consider the tenor of the said instrument as satisfying the conditions set forth in the said Orders of the 21st *April* last, upon which the said Orders were to cease and determine, is nevertheless disposed, on his part, to take such measures as may tend to re-establish the intercourse between neutral and belligerent nations upon its accustomed principles;

His

A P P E N D I X.

His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, is therefore pleased, by and with the advice of His Majesty's Privy Council, to order and declare, and it is hereby ordered and declared, That the Order in Council, bearing date the 7th day of *January* 1807, and the Order in Council, bearing date the 26th day of *April* 1809, be revoked, so far as may regard *American* vessels and their cargoes, being *American* property, from the 1st day of *August* next.

But whereas by certain acts of the Government of the United States of *America*, all *British* armed vessels are excluded from the harbours and waters of the said United States, the armed Vessels of *France* being permitted to enter therein, and the commercial intercourse between *Great Britain* and the said United States being interdicted, the commercial intercourse between *France* and the said United States having been restored, His Royal Highness the Prince Regent is pleased hereby further to declare, in the name and on the behalf of His Majesty, That if the Government of the said *United States* shall not, as soon as may be, after this Order shall have been duly notified by His Majesty's Minister in *America* to the said Government, revoke or cause to be revoked the said acts, this present Order shall, in that case, *after due notice* signified by His Majesty's Minister in *America* to the said Government, be *thenceforth* null and of no effect.

It is further ordered and declared, That all *American* Vessels and their cargoes, being *American* property, that shall have been captured subsequently to the 20th day of *May* last, for a breach of the aforesaid Orders in Council alone, and which shall not have been actually condemned before the date of this Order, and that all ships and cargoes as aforesaid, that shall henceforth be captured under the said Orders, prior to the 1st day of *August* next, shall not be proceeded against to condemnation till further orders, but shall, in the event of this Order not becoming null and of no effect in the case aforesaid, *be forthwith liberated and restored*, subject to such reasonable expences on the part of the captors as shall have been justly incurred.

Provided, that nothing in this Order contained, respecting the revocation of the Orders herein mentioned, shall be taken to revive wholly or in part the Orders in Council of the 11th of *November* 1807, or any other Order not herein mentioned, or to deprive parties of any legal remedy to which they may be entitled under the Order in Council of the 21st of *April* 1812.

A P P E N D I X.

His Royal Highness the Prince Regent is hereby pleased further to declare, in the name and on the behalf of His Majesty, that nothing in this present Order contained shall be understood to preclude His Royal Highness the Prince Regent, if circumstances shall so require, from restoring, after reasonable notice, the Orders of the 7th of *January* 1807 and 26th of *April* 1809, or any part thereof, to their full effect, or from taking such other measures of retaliation against the enemy as may appear to His Royal Highness to be just and necessary.

And the Right Honourable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice Admiralty, are to take the necessary measures herein as to them may respectively appertain.

JA^s. BULLER.

R.

Mr. Russell to the Duke of Bassano.

Sir,

Paris, 11th May 1811.

I HAVE the honour to present to your Excellency a list of the *American* vessels which, according to the information I have obtained, have been captured by *French* privateers since the 1st of *November* last, and brought into the ports of *France*. All proceedings in relation to these vessels have been suspended in the council of prizes, with the same view, no doubt, as the proceedings in the custom-house had been deferred with regard to those which had arrived voluntarily. The friendly admission of the latter encourages me to hope that such of the former at least as were bound to *French* ports, or to the ports of the allies of *France*, or to the *United States*, especially those in ballast, will be immediately released, and that orders will be given to bring on the trials of the remainder, should such a course be judged indispensable, without any unnecessary delay.

The measure for which I now ask, being in perfect accord with the friendly sentiments which prevail between the two countries, I persuade myself will obtain the early assent of his Majesty.

I pray your excellency to accept the assurances of my highest consideration.

(Signed) JONATHAN RUSSELL.

The Duke of *Bassano*, &c. &c.

APPENDIX.

LIST of AMERICAN VESSELS taken by French Privateers since the 1st of November 1810, and carried into the Ports of France.

Vessels.	Where from.	Where bound.	Cargoes.	When taken.	Where brought.
Robinson Ova	Norfolk	London	Tobacco, cotton, and staves	21st December 1810	Dunkirk.
Mary Ann	Charleston	Id.	Cotton and rice	3d March 1811	Id.
General Eaton	London	Charleston	In ballast	6th December 1811	Calais.
Neptune	Id.	Id.	Id.	7th do.	Dieppe.
Clio	Id.	Philadelphia	English manufactures	Id.	Vessel lost off Trequier, part of cargo saved.
Two Brothers	Boston	St. Malo	Cotton, indigo, pot-ashes codfish, fish-oil, and dye wood	20th Id.	St. Malo. N. B. This vessel was taken within the territorial jurisdiction of France.
Star	Salem	Naples	Coffee, indigo, fish, dye wood, &c.	2d February 1811	Marfeilles.
Zebra	Boston	Tarragona	40,000 staves	27th January do.	Do.

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S.

Mr. Russell to the Secretary of State.

Sir,

Paris, 9th of June 1811.

THE case of the *New Orleans* packet having apparently excited considerable interest, it may not be unacceptable to you to receive a more particular account of it than I have hitherto transmitted.

This vessel, owned by Mr. *Alexander Ruden*, of *New York*, left that place on the 25th of *July*, with a clearance for *Lisbon*, but actually destined for *Gibraltar*. Her cargo, likewise the property of Mr. *Ruden*, consisted of 207 whole tierces and 31 half tierces of rice, 330 bags of *Surinam* cocoa, 10 hogsheds of tobacco, 6 tierces of hams, 50 barrels of pork, 60 barrels of beef, 200 barrels of flour, 30 tierces of beans, and 64 firkins of butter. On her passage to *Gibraltar* she was boarded by an *English* frigate and an *English* schooner, and after a short detention allowed to proceed. On arriving at *Gibraltar* the 26th of *August*, Mr. *Munroe*, the supercargo, proceeded to sell the cargo, and actually disposed of the flour, the beans, and the butter, when about the 20th of *September* a packet arrived there from *England*, bringing newspapers containing the publication of the letter from the duke of *Cadore* of the 5th of *August*. On the receipt of this intelligence Mr. *Munroe* immediately suspended his sales, and after having consulted with Mr. *Hackley*, the *American* Consul at *Cadix*, he determined to proceed with the remainder of his cargo to *Bordeaux*. He remained however at *Gibraltar* until the 22d of *October*, that he might not arrive in *France* before the 1st of *November*, the day on which the *Berlin* and *Milan* decrees were to cease to operate. He arrived in the *Garonne* on the 14th of *November*, but by reason of his quarantine did not reach *Bordeaux* before the 3d of *December*. On the 5th of this month the director of the customs there seized the *New Orleans* Packet and her cargo under the *Milan* decrees of the 23d *November* and 17th *December* 1807, expressly set forth, for having come from an *English* port, and for having been visited by an *English* vessel of war. These facts having been stated to me by Mr. *Munroe*, and by Mr. *Meyer*, the *American* Vice Consul at *Bordeaux*, and the principal one, that of the seizure under the *Milan* decrees, being established by the *procès verbal* put into my hands by Mr. *Martini*, one of the consignees of the cargo, I conceived it to be my duty not to suffer the transaction to pass unnoticed, and thereby permit it to grow into a violation of the engagements of this government. While I was considering the most proper mode of bringing the conduct of the custom-house officer at the port under the eyes of his

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his superiors, I learnt the arrival of the *Essex* at *L'Orient*. From the time at which this frigate was reported to have left the *United States*, I had no doubt that she had brought the proclamation of the President, announcing the revocation of the very decrees under which this precipitate seizure had been made. I could but think, therefore, that it was important to afford to this government an opportunity of disavowing the conduct of its officer, so incompatible with the engagements on which the President had in all probability reposed with confidence, in season to shew that this confidence had not been mistimed or misplaced. To have waited for the receipt of the proclamation, in order to make use of it for the liberation of the *New Orleans* packet, appeared to me a preposterous and unworthy course of proceeding, and to be nothing better than absurdly and basely employing the declaration of the President that the *Berlin* and *Milan* decrees *had been* revoked, as the means of obtaining their *revocation*. I believed it became me to take higher ground, and, without confining myself to the mode best calculated to recover the property, to pursue that which the dignity of the *American* government required.

A crisis, in my opinion, presented itself, which was to decide whether the *French* edicts were retracted as a preliminary to the execution of our law, or whether by the non-performance of one party and the prompt performance of the other, the order in which these measures ought to stand was to be reversed, and the *American* government shuffled into the lead, where national honour and the law required it to follow. Uncertain what would be the conduct of this government, but clear what it ought to be, I thought it politic to present briefly the honest construction of the terms in which the revocation of the decrees was communicated on the 5th of *August*, that the conditions might not be tortured into a pretext for continuing them. I believed this to be the more necessary, as no occasion hitherto occurred for offering such an interpretation. I likewise supposed it to be desirable to take from this government, by a concise statement of facts, the power of imputing neglect to the *United States*, in performing the act required of them, for the purpose of finding in this neglect a colour for again executing the decrees. These were my views in writing promptly and frankly on the occasion.

So acceptable indeed did I suppose it would be to the feelings of the *American* government, to obtain at least an explanation of *an act ostensibly proving the continued operation of the decrees, previous to communicating the proclamation of the President, announcing*

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announcing their revocation, that, although I received this proclamation on the 13th of *December*, I deferred the communication of it to the Duke of *Cadore* until the 17th of that month; nor should I then have communicated it, had not an interview with him, on the 15th, led me to believe that much time might be necessary to procure official reports from the custom-house relative to the seizure in question, and that until these reports were received, it would be impossible formally to explain or correct this proceeding. When, however, I declined, uninstructed as I was, incurring the responsibility of this protracted delay, and decided on communicating the proclamation before a satisfactory explanation was received, I took care to guard against any misconstruction, by explicitly declaring at the outset, that this proclamation “ had been issued alone on the ground that the revocation of the *Berlin* and *Milan* decrees did not depend on any condition previously to be performed by the United States.”

The custom-house officers at *Bordeaux* commenced unlading the *New Orleans* packet on the 10th of *December*, and completed this work on the 30th of that month, as appears by their *procès verbal* of those dates. That of the 20th expressly declares, that the confiscation of this property was to be pursued before the Imperial Council of Prizes at *Paris*, according to the decrees of the 23d *November* and 17th of *December* 1807, or, in other words, the decrees of *Milan*. The decree of the 23d of *March*, or the *Rambouillet* decree, is also mentioned; but as I wrote my note of the 10th of *December* with a view only to the letter of the Duke of *Cadore*, announcing the revocation of the *Berlin* and *Milan* decrees, and as the *procès verbal* of the 5th appears to waive the applications of the *Rambouillet* decree as unnecessary, I took no notice of it.

On *Monday* the 17th of *December* my remonstrance was submitted to a council of commerce, and referred by it to the director general of the customs for his report. From this time, all further proceedings against the *New Orleans* packet were suspended. The papers were not transmitted to the council of prizes, nor a prosecution instituted before that tribunal for the confiscation of the property, as was professedly the intention of the officers concerned in the seizure. This prosecution was not only abandoned, but on the 9th of *January* the vessel and cargo were placed at the disposition of the consignees, on giving bond to pay the estimated amount, should it definitively be so decided. Nothing is now wanting to complete the liberation of the *New Orleans* packet and her cargo but the cancelling of this bond.

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It appears, therefore, that the remonstrance of the 10th of *December* arrested the proceeding complained of, before it had assumed a definitive character, or unequivocally become a breach of faith, and not only rescued the property from the seizure with which it had been visited, but, by procuring its admission, placed it in a situation more favourable than that of many other vessels and cargoes, which continued to be holden in a kind of *morte-main* by the suspension of all proceedings with regard to them.

I have the honour to be, &c. &c.

(Signed) JONA. RUSSELL.

Hon. Secretary of the United States.

P.S. *July* the 5th.—I have the satisfaction to announce to you, that since writing the above, an order has been given to cancel the bond, and a letter just received from the commercial agent of the United States at *Bordeaux*, informs me that it is actually cancelled.

T.

Mr. Russell to Mr. Pinckney.

Sir,

Paris, December 1, 1810

AS nothing has transpired here of sufficient importance to be communicated by a special messenger, and as no safe private conveyance has hitherto presented itself till now, to acknowledge the receipt of your letters under dates of the 7th and 28th of *October*; no event within my knowledge has occurred, either before or since the 1st of *November*, to vary the construction given by us to the very positive and precise assurances of the Duke of *Cadore* on the 5th of *August*, relative to the revocation of the *Berlin* and *Milan* decrees. That these decrees have not been executed for an entire month on any vessel arriving during that time in any of the ports of *France*, may, when connected with the terms in which their revocation was announced, fortify the presumption that they have ceased to operate. I know of no better evidence than this, which the negative character of the case admits, or how the non-existence of an edict can be proved, *except by the promulgation of its repeal, and its subsequent non-execution.*

Our attention here is now turned towards *England* and the *United States*. The performance of one of the conditions on which the revocation of the decrees was predicated, and which is essential to render it permanent, is anxiously expected. And it

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is devoutly to be wished that *England*, by evincing the sincerity of her former professions, may save the *United States* from the necessity of resorting to the measure which exclusively depends on them.

I need not suggest to you the importance of transmitting hither, as early as possible, any information of a decided character which you may possess relative to this subject, as an impatience is already betrayed here to learn that one or the other of the conditions has been performed,

I am, Sir, with great respect,

Your faithful servant,

(Signed)

JONA. RUSSELL.

His Excellency *William Pinckney*, &c.

V.

Mr. Russell to the Secretary of State.

Sir,

Paris, 8th May 1811.

I HAD the honour to address to you on the 6th inst. by various ports, several copies of the note of the Duke of *Bassano* to me on the 4th, containing a list of the vessels, the admission of whose cargoes had been authorised by the Emperor.

This list comprizes all the *American* vessels which had arrived, without capture, in the ports of *France* or the kingdom of *Italy*, since the first of *November*, and which had not already been admitted, excepting the schooner *Friendship*.

The papers of the *Friendship* had been mislaid at the custom-house, and no report of her case made to the Emperor.

As the *New Orleans* packet and her cargo had been given up on bond in *January* last, there can be no longer any question with regard to their admission; but to make their liberation complete, the bond should be cancelled.

All the vessels mentioned in the list, excepting the *Grace Ann Greene*, had come direct from the *United States*, without having done or submitted to any known act, which could have subjected them to the operation of the *Berlin* and *Milan* decrees, had these decrees continued in force.

The *Grace Ann Greene* stopped at *Gibraltar*, remained many days there, and in proceeding thence to *Marseilles* was captured by an *English* vessel of war. The captain of the *Grace Ann Greene*, with a few of his people, rose upon the *British* prize crew, re-took

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took his vessel from them, and carried her and them into the port to which he was bound.

The captain considered this recapture of his vessel as an act of resistance to the *British* Orders in Council, and as exempting his property from the operation of the *French* decrees professedly issued in retaliation of those orders. He likewise made a merit of delivering to this government nine of its enemies, to be treated as prisoners of war.

His vessel was liberated in *December*, and his cargo the beginning of *April* last; and there is some difficulty in precisely ascertaining whether this liberation was predicated on the general revocation of the *Berlin* and *Milan* decrees, or on a special exemption from them, owing to the particular circumstances of the case.

It is somewhat singular this vessel was placed on the list of the 4th inst. when she had been liberated and her cargo admitted so long before.

It may not be improper to remark, that no *American vessel*, captured since the 1st of *November*, has yet been released or had a trial.

These are the explanations which belong to the measure I had the honour to communicate to you on the 6th instant, and may afford some assistance in forming a just appreciation of its extent and character.

I have the honour to be, Sir,

With great consideration and respect,

Your most faithful and assured servant,

(Signed)

JONA. RUSSELL.

U.

ADMIRALTY PRIZE COURT.

APPEARED personally *Jonathan Russell*, of *Bentinck Street, Manchester Square*, *Chargé des Affaires* of the Government of the United States of *America* at the Court of His *Britannic Majesty*, and made oath, that he was resident at *Paris* from the 1st of *November* 1810 to the month of *September* 1811, in the same capacity at the Court of *France*; and that he verily believes, that during that period no *American vessel* or cargo was condemned for a violation of the *Berlin* or *Milan* Decrees, which had been captured after the 1st of *November* 1810; and he believes that such a condemnation could not have taken place without information thereof

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having reached him: And the deponent further saith, that several cases came to his knowledge, in which restitution had been decreed to the claimants, although the vessels seized would have been liable to condemnation under the said *Berlin* or *Milan* Decrees had they continued to be put into execution: And the deponent further saith, that he has been officially informed by the *American* Minister resident at *Paris*, that from the said month of *September* 1811, to the 2d day of the month of *March* 1812, no condemnation under the said *Berlin* or *Milan* Decrees had taken place, and that there had not been a single instance of their application to an *American* vessel or cargo since the month of *September* 1811, though many instances had occurred to which they must have been applied had they been in vigour; but that many *American* vessels and cargoes had been restored to the lawful owners thereof, which would have violated the said Decrees had they been in force: And the deponent further saith, he hath no doubt but more specific information as to cases restored in the *French* Courts of Prize might be procured from the records of the said proceedings: And the deponent further saith, that the exhibits hereto annexed marked (A.) and (B.) are two letters which he has received, viz. the former on or about the 7th day of *February* last, and the latter the end of *March* last, from *Joel Barlow* Esquire, the Minister Plenipotentiary of the Government of the United States of *America* at the Court of *France*, and are, as he doth verily and in his conscience believe, true and genuine; and that the name and subscription of *J. Barlow*, set and subscribed to the said letters, are of the proper hand-writing and subscription of the said *J. Barlow* Esquire.

JON. RUSSELL.

27th *July* 1812.—The said *Jonathan Russell* was duly sworn to the truth of this affidavit,

Before me,

S. LUSHINGTON Sur^r.

Present, GEORGE JENNER, Not. Pub.

(A.)

Dear Sir,

Paris, 29th *January* 1812.

THE ship *Acastus*, Captain *Cottle*, from *Norfolk*, bound to *Tonningen* with tobacco, had been boarded by an *English* frigate, and

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and was taken by a *French* privateer, and brought into *Fecamp*, for the fact of having been so boarded. This was in *November* last. On the 2d of *December* I stated the facts to the Duke of *Bassano*, and in a few days after the ship and cargo were ordered by the *Emperor* to be restored to the owners, on condition that she had not violated the *French* navigation laws, which latter question was sent to the Council of Prizes to determine. The Council determined that no such violation had taken place, and the ship and cargo were definitively restored to Captain *Cottle*. To the above fact I can add, that since my residence here several *American* vessels with cargoes have arrived, and been admitted in the ports of *France*, after having touched in *England*, the fact being declared; and there is no instance within that period of a vessel, in either of the cases of the *Berlin* and *Milan* Decrees, being detained or molested by the *French* Government.

With great respect and friendship,

Your obedient servant,

J. BARLOW.

I, the undersigned Chargé d’Affaires of the United States of *America*, near His *Britannic* Majesty, do hereby certify, that the name and signature “*J. Barlow*,” subscribed to the foregoing letter, is the proper hand-writing and signature of *Joel Barlow*, Minister Plenipotentiary of the said *United States* at *Paris*, and entitled to full faith and credit.

JON. RUSSELL.

Honourable Mr. *Russell*.

(B.)

Dear Sir,

Paris, 2d *March* 1812.

IT seems, from a variety of documents that I have seen, and among others the decision of Sir *William Scott* in the case of the ship *Fox*, that the *British* government requires more proof of the *effectual revocation* by the *French* government of the *Berlin* and *Milan* Decrees. Though it is not easy to perceive what purpose such additional proof is to answer, either for obtaining justice or for shewing why it is refused, yet I herewith send you a few cases in addition to what have already been furnished.

Among these, I believe you will find such as will touch every point that was contemplated in those Decrees, to prove them all to have been removed. If not, and still further proof after this

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should

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should be deemed necessary, I can doubtless furnish it; for the subject is not exhausted, though your patience may be.

1st, The schooner *Fly*, *Addams*, of and from *New York*, loaded with cotton, sugar, and coffee, bound to *St. Petersburg*, taken by an *English* cruizer and carried into *Cowes*, thence released, came into *Havre*, declared the facts as above entered, sold her cargo, reloaded with *French* goods, and departed without molestation.

2d, The brig *Ann Maria*, of and from *New York*, *Daniel Campbell* master, bound to a port in *France*, loaded with potash, cotton, slaves, put into *Falmouth*, then came to *Merlain*, entered, sold, bought, reloaded, and departed as above.

3d, Ship *Neptune*, *Hopkins*, bound from *London* to *Charlestown*, in ballast, taken, brought into *Dieppe*, restored by a Decree of the Emperor, and departed again in ballast.

4th, Ship *Marquis de Someruelles*, with indigo, fish, cotton, bound to *Civita Vecchia*, boarded by a *British* frigate, arrived at her port, declared the fact, entered, sold, and is now reloading for the *United States*.

5th, Ship *Phebe*, from *Boston* to *Civita Vecchia*, colonial produce, loaded as above, arrived, entered, sold, and now reloading for departure.

6th, Ship *Recovery*, of *Boston*, with pepper, loaded, arrived, entered as above at the same place, now selling her cargo.

7th, Brig *Star*, bound to *Naples*, with colonial produce, taken, and carried into *Toulon*, for having touched at *Gibraltar*, under pretence of violation of the Decrees, and restored by the Emperor, on the express ground that the Decrees no longer existed as applicable to the *United States*.

It would be wrong to alledge that any of these vessels were protected by special licences. In the first place, only three of the seven had licences; those were the *Fly*, the *Phebe*, and the *Recovery*. Secondly, it is well known that licences are not and never were given as protections against the effect of these Decrees; they have nothing to do with the Decrees. The object of the licences given to vessels of the *United States* is distinctly defined to be merely to guard against false papers, and to prove the regularity of the voyage; they are used only for colonial produce, and not at all for the produce of the *United States*; and we see in every instance, that a vessel loaded wholly with produce of the *United States*, or in ballast, is respected by the government here; at least I know it has been so in every instance since my arrival in *September* last; and there have been, I have no doubt, not less than thirty or forty such

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such vessels in *France* within that period. But a vessel loaded with colonial produce, and sailing without such a licence, would be certainly confiscated, whether she had violated the supposed Decrees or not. Indeed, the regulation about licences is not a maritime regulation, and it has nothing to do with neutral rights: It is, strictly speaking, a relaxation of the *French* navigation act in favour of such particular persons as obtain them, to enable such persons to bring goods of an origin foreign to the *United States* into *France*.

It is the same as if a vessel of the *United States* should by a special relaxation of the *English* navigation act obtain a licence to bring *Brazil* sugars or *French* wines into *England*. Such a licence would surely not be considered as a breach on the part of *England* of our neutral rights; neither would it be a breach of such rights to confiscate our vessels carrying such articles into *England* without a licence. The violation of the navigation law either of *France* or *England* is not a neutral right, and therefore the punishment of such violation is not a breach of neutral right.

I have taken the liberty to be thus particular on this head, because in several instances, during this discussion with the ministers of the *British* government, I have seen a disposition in them to confound with the *French* Decrees not only this affair of special licences, but several regulations merely fiscal and municipal, bearing no relation to neutral rights or to the Decrees in question.

I will terminate this statement by repeating the solemn declaration that I made to you in my letter of the 30th *January*; and there is no impropriety in the repetition, since a greater length of time has given a wider scope to the declaration, that since my arrival in *September* last, there has not been a single instance of the application of the *Berlin* and *Milan* Decrees to an *American* vessel or cargo, and that I have not heard of their having been so applied since the 1st of *November* 1810, though many instances have occurred within that period in which they must have been so applied, had they been in vigour.

It is difficult to conceive, probably impossible to procure, and certainly insulting to require a mass of evidence more positive than this, or more conclusive to every unprejudiced mind.

With great respect and friendship,

Your obedient servant,

J. BARLOW.

I, the undersigned *Chargé des Affaires* of the *United States* of *America*, at the Court of *Great Britain*, do hereby certify that the

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foregoing letter was received by me from *Joel Barlow*, Minister Plenipotentiary of the said United States at *Paris*, and that the name and signature "*J. Barlow*" thereto subscribed, is the proper hand-writing and signature of the said *Joel Barlow*, and that full faith and credit are due to it.

JONA. RUSSELL.

W.

Extract of a Letter from Mr. Russell to the Secretary of State of the United States, dated,

Paris, 15th July 1811.

" ON the 5th of that month [*May*] I received a note [No. 1] from the Duke of *Bassano*, dated the 4th, containing a list of sixteen *American* vessels whose cargoes had been admitted by order of the Emperor. I immediately transmitted to you several copies of this communication, and I gave you on the 8th such an account [No. 2] of the admitted cases, as might aid you in forming a correct estimate of the political value of the measure adopted in their favour.

" Although I was fully impressed with the importance of an early decision in favour of the captured vessels, none of which had been included in the list above mentioned, yet I deemed it proper to wait a few days before I made an application upon the subject. By this delay I gave the Government here an opportunity of obtaining the necessary information concerning these cases, and of pursuing spontaneously the course which the relations between the two countries appeared to require. On the 11th, however, having learnt at the council of prizes that no new order had been received there, judged it to be my duty no longer to remain silent, lest this Government should erroneously suppose that what had been done was completely satisfactory to the *United States*, and, construing my silence into an acquiescence in this opinion, neglect to do more. I therefore on that day addressed to the Duke of *Bassano* my note [No. 3] with a list of *American* vessels captured since the 1st of *November*. On the 16th, I learnt that he had laid this note, with a general report on it, before the Emperor; but that *his Majesty* declined taking any decision with regard to it, before it had been submitted to a council of commerce. Unfortunately, this council did not meet before the departure of the Emperor for *Cherbourg*; and during his absence, and the festivals which succeeded it, there was no assemblage of this body.

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“ Immediately on receiving the communication of the Duke of *Bassano* of the 4th of *May*, I addressed him a note [No. 4] concerning the brig *Good Intent*, detained at *St. Andero*. Although this vessel had in fact been captured, yet, from the peculiar circumstances of the case, I hoped that she would be placed on the same footing as those which had been admitted. The answer [No. 5] which was returned by the Duke of *Bassano*, dated the 25th and received the 28th, announced to me, however, that this affair must be carried before the council of prizes. Wishing to rescue this case from this inauspicious mode of proceeding, I again addressed him in relation to it, in a note [No. 6] on the 2d of *June*. If I could not obtain at once the restoration of this vessel, it was desirable, at least, that she should be admitted to the benefit of the general measure, which I insinuated might be taken in favour of the captured class mentioned in my note of the 11th of *May*.

“ As in this note I have stated the case of the *Good Intent* to be analogous to those of the *Hare* and the *John*, it may be proper to explain to you both the points of resemblance and diversity, in order to reconcile this note with my declaration, that no captured vessel was on the list of the 4th of *May*. The cases agree in the destination to places under the authority of *France*, and in the arrestation by launches in the service of the *French Government*; they differ in the *Hare* and *John* having already, before they were taken, arrived at the port, and within the territorial jurisdiction of the country to which they were bound, and the *Good Intent* having been taken without such jurisdiction, and conducted to a port to which she was not destined. The taking possession of the *Hare* and the *John*, may be considered then as a seizure in port, and that of the *Good Intent* as a capture on the high seas.

“ On perceiving that the schooner *Friendship* was not named in the list of admitted vessels, I caused inquiry to be made at the custom-house concerning the cause of this omission. It was stated that her papers had been mislaid, but that search was making for them, and that, when found, a report would immediately be made. I waited for this report until the 18th of *May*; but finding it had not been made, I conceived it might be useful, in order to accelerate it, and to render complete the admission of the entire class to which this case belonged, to attract towards the *Friendship* the attention of the Minister of Foreign Relations. With this view, I presented to him my note [No. 7.] of that date.

“ Having

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" Having reflected much on the condition attached to the admission of the *American* cargoes, to export two thirds of the proceeds in silks, and being persuaded that the tendency of this restriction, added to the dangers of a vigilant blockade, and to the exactions of excessive tariff, was to annihilate all commercial intercourse between the two countries, I believed it would not be improper for me to offer to this government a few remarks on the subject. This I was the more inclined to do, as it was to be apprehended that this condition was not imposed as an expedient, for temporary purposes only, but that it was intended to be continued as the essential part of a permanent system. In a note, therefore, of the 10th of *June*, [No. 8.] I suggested to the Duke of *Bassano* the evils which might be expected naturally to result from the operation of this restriction on exports. It is indeed apparent, that a trade that has to run the gauntlet of a *British* blockade, and is crushed with extravagant duties inwards, and shackled with this singular restriction outwards, cannot continue.

" On the 14th of *June*, Mr. *Hamilton*, of the *John Adams*, reached *Paris*, and informed me that this vessel had arrived at *Cherbourg*. Unwilling to close my dispatches by her, without being able to communicate something of a more definite and satisfactory character than any thing which had hitherto transpired, I immediately called at the office of foreign relations; but the Minister being at *St. Cloud*, I was obliged to postpone the interview which I sought, until the *Tuesday* following. At this interview I stated to him the arrival of the frigate, and my solicitude to transmit by her to the *United States*, some act of his Government; justifying the expectation with which the important law which she had brought hither, had undoubtedly been passed. I urged particularly a reply to my note of the 11th of *May*, relative to the captured vessels, and observed, that although the mere pecuniary value of this property might not be great, yet in a political point of view its immediate liberation was of the utmost consequence. I intimated to him at the same time, that my anxiety was such to communicate, by the *John Adams*, a decision on these captures to the *American* Government, that I should detain this vessel until I had received it. He replied that his sentiments accorded perfectly with mine in this matter, and ascribed the delay which had taken place to the same causes as I have assigned. He assured me, however, that he would immediately occupy himself again with this business, and unless a council of commerce should be holden within a few days, he would make a special report to the Emperor, and endeavour to obtain

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obtain a decision from him in person. He approved my intention of detaining the frigate, and engaged to do whatever might depend on him, to enable me to dispatch her with satisfaction. He added that he had already made inquiries of the competent authorities, concerning the *Good Intent* and the *Friendship*, and that when their reports should be received, he would do whatever the circumstances of the cases might warrant.

“I now suggested to him the evils which resulted to our commercial intercourse with *France*, from the great uncertainty which attended it, owing to the total want on their part of clear and general regulations. After making a few observations in explanation of this remark, I requested to know if he would have any communication to make to me on the subject previous to the sailing of the *John Adams*. I was led to make this inquiry from information which I had indirectly obtained, that several resolutions for the regulation of our trade had been definitively decreed. He replied, that no such communication would be made here, but that Mr. *Serrurier* would be fully instructed on this head. The resolutions just mentioned, as far as I have learnt, are, to admit the produce of the *United States* (except sugar) without special permits or licences; to admit coffee, sugar, and other colonial produce, with such permits or licences, and to prohibit every thing arriving from *Great Britain*, or places under her controul.

“He again mentioned the discovery of the regulation of the year twelve, authorizing the certificates of origin for *French* ports only, or for ports in possession of the *French* armies; but declared that after the most thorough examination of the archives of his department, no document or record had been found permitting these certificates to be granted for the ports of neutral or allied powers. He again, however, professed a favourable disposition towards our negotiations in *Denmark*, and said, “*Le succès de la mission de Mons. Erving s'accorderait parfaitement avec nos sentimens, et ne contrarierait nullement notre politique.*”

“With the view above stated, I detained the *John Adams* until the 9th instant. I had from time to time, in the meanwhile, informed myself of the proceedings with regard to the captured vessels, and ascertained that in fact the Duke of *Bassano* had made a report in relation to them. The Emperor it appears, however, still wished for the decision of his Council of Commerce, and the report was laid before them on the 1st of this month, being the first time they had assembled since the date of my letter of the 11th *May*. I waited in daily expectation of hearing the result
of

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of their deliberations until the 9th instant, when, conceiving sufficient time had been allowed for receiving it, and not feeling perfectly at my ease under the responsibility I was incurring for the unauthorized detention of the *John Adams*, I determined to learn from the Duke of *Bassano* in person what I might reasonably expect in the matter. I accordingly procured an interview with him on the day last mentioned. I reminded him of what had passed at our conference on the 18th ultimo, and told him, that in consequence thereof I had kept the ship; but that I could not with propriety detain her longer, without the evident prospect of obtaining from the *French* government the release of the captured vessels. He expressed a conviction of the justice of my observations, and assured me that he was in hourly expectation of receiving a decision on the captured cases, and hoped that the *John Adams* might not be permitted to return without it. I thereupon consented to keep my dispatches open until the 13th, assuring him that I could not take upon myself to protract the detention of the *John Adams* beyond that period.

“ On the 13th, about one o'clock, I received a note from the Duke of *Bassano*, of which the enclosed [No. 9.] is a copy. I waited upon him immediately, and was informed that the *Two Brothers*, the *Good Intent*, and the *Star*, three of the captured vessels, had been liberated. He added, that no unnecessary delay would be allowed in deciding upon the whole.

“ I shall dispatch Mr. *Hamilton* this day, and I shall send with him a messenger to be landed on the other side, who will carry to Mr. *Smith* an account [No. 10.] of what has been done here, to be used by him as he shall judge proper.”

X.

Translation of a letter from General Turreau to the Secretary of State, dated,

Sir,

November 14, 1810.

ALTHOUGH you may have been already informed, through another official channel, of the repeal of the decrees of *Berlin* and *Milan*, it is agreeable to me to have to confirm to you this new liberal disposition of my Court towards the Government of the States of the Union.

You will recollect, without doubt, Sir, that these decrees were adopted in retaliation for the multiplied measures of *England* against

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against the rights of neutrals, and especially against those of the *United States*: and after this new proof of deference to the wishes of your Government, his Majesty the Emperor has room to believe, that it will make new efforts to withdraw the *American* commerce from the yoke which the prohibitory acts of *Great Britain* have imposed upon it. You will at the same time observe, Sir, that the clearly expressed intention of my Government is, that the renewal of commercial intercourse between *France* and the *United States* cannot alter the system of exclusion adopted by all *Europe*, against all the products of the soil or of the manufactures of *England* or her colonies: a system, the wisdom and advantages of which are already proved by its developement and its success; and of which, also, the *United States*, as an agricultural and commercial power, have a particular interest in aiding, and hastening the completion. Moreover, Sir, this measure of my Government, and those which yours may think proper to adopt, will prove the inutility of the efforts of the common enemy to break the ties of friendship which a humane and generous policy has necessarily formed between *France* and the *United States*, and which the actual crisis ought to draw closer. We ought hereafter, Sir, to hope, or rather we may be assured, that new relations still more close and more friendly are about to be formed between *Americans* and *Frenchmen*, and that these two people will be more than ever convinced, that their glory, their interest and their happiness must eternally consecrate the principle and the conservation of these relations.

I seize with eagerness this occasion, Sir, of renewing to you the assurance of my high consideration.

(Signed) TURREAU.

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